Supreme Court, U.S.
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No. 06-2711

IN THE
SUPREME COURT OF THE UNITED STATES

FREDERIC ROSEMEYER, *et al.*,
Petitioner

v.

EDWARD V. HUMMEL,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Did the Third Circuit contravene the directives of, and exceed its authority under, the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") when it refused to defer to the state appellate court's reasonable rejection of a habeas petitioner's claim under *Strickland v. Washington*, 466 U.S. 668 (1984)?

PARTIES TO THE PROCEEDING

The Petitioners are Frederic Rosemeyer, Superintendent of the Laurel Highlands Pennsylvania State Correctional Institution; and Thomas J. Corbett, Esquire, Attorney General for the Commonwealth of Pennsylvania. Corbett is substituted for his predecessor, D. Michael Fisher. See Fed. R. App. P. 43(c).

The Respondent is Edward Vincent Hummel, an inmate at the Laurel Highlands Pennsylvania State Correctional Institution.

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PETITION FOR WRIT OF CERTIORARI

The District Attorney of Clearfield County, Commonwealth of Pennsylvania, on behalf of Frederic Rosemeyer, Superintendent of the Laurel Highlands Pennsylvania State Correctional Institution, respectfully petitions for a writ of certiorari to review the order of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The Third Circuit panel's opinion is reproduced at App. 128-164. The United States District Court for the Western District of Pennsylvania's memorandum opinion denying relief is reproduced at App. 123-125; the Report and Recommendation of the District Magistrate Judge incorporated therein is reproduced at App. 81-122. The Pennsylvania court of appeal's decision denying Hummel's petition for post-conviction relief is reproduced at App. 34-80. The Pennsylvania court of appeal's opinion on direct appeal is reproduced at App. 1-5. The Pennsylvania trial court's Opinion denying Hummel's Petition for Post Conviction Relief is reproduced at App. 6-33.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Third Circuit issued its order denying the State's petition for rehearing on May 27, 2009. Justice Alito extended the time period to file a petition for writ of certiorari to September 24, 2009. The

Superintendent now files this petition and invokes the Court's jurisdiction under 28 U.S.C. § 1254(1) (2003).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have assistance of counsel for his defense."

U.S.C.A. Const. Amend. 6.

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") provides, in pertinent part:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States[.]

* * *

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant

shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

28 U.S.C. §§ 2254(d)(1), (e)(1).

STATEMENT OF THE CASE

On November 22, 1991, Edward V. Hummel lay in wait for his wife at their home. Earlier that day, he had learned of his wife's infidelities. When his wife entered the house, Hummel severely beat her and then shot and killed her. He then went to his parents' house and told them what he had done. He returned to his house, scribbled a note to his two teenage daughters, and shot himself in the head. As a result of his failed suicide attempt, Hummel is now a paraplegic with limited mental abilities. Following Hummel's discharge from a series of hospitals and rehabilitation facilities, he was charged with homicide and aggravated assault.

From the outset of the criminal proceedings, Hummel's competence to stand trial was at issue. Prior to the preliminary hearing, defense counsel sought and obtained multiple continuances so that appropriate psychological testing could be conducted to determine whether Hummel was competent to stand trial in light of his self-inflicted gunshot wound. The Commonwealth and defense trial counsel each retained forensic psychologists who reviewed all relevant and available medical records from the various hospitals, rehabilitation centers, and other treatment facilities in which Hummel had been institutionalized from the evening of the shooting until he was released on recognizance bail to the custody of his parents. Importantly, each expert personally met with Hummel prior to completing his evaluation. Both doctors agreed that

Hummel had a rational understanding of the charges against him and a rudimentary understanding of legal procedures. The doctors' reservations focused upon Hummel's ability to assist his counsel in his defense. Notably, neither expert opined that Hummel was legally incompetent to stand trial. In fact, while the Commonwealth's expert rendered no opinion on the issue, the defense expert stated that Hummel **was** competent if specific accommodations for his physical and mental limitations were made during trial. The defense expert specifically found that Hummel was "capable of thinking rationally in a planned and organized manner" and alternative means existed to compensate for Hummel's inability to recall details of the incident. Interestingly, the doctor noted that Hummel and his parents expressed a desire to proceed with the legal process without further delay.

Pursuant to defense counsel's petition for court determination of his client's competency, the trial court held a conference to discuss Hummel's ability to stand trial. Relying on the opinions of the two medical experts, the judge found Hummel was legally competent to stand trial; in his order, the judge noted that he was aware of, and would abide by, the adaptations at trial as suggested by both medical experts. Based upon the judge's observations during trial, the judge declined to revisit his earlier determination that Hummel was competent.

Upon jury verdicts of guilty, Hummel was sentenced to life imprisonment for first degree murder and a concurrent term of five to ten years for

aggravated assault. On direct appeal, defense counsel questioned the trial court's determination that his client was competent to stand trial. The appellate court rejected this contention, affirming the conviction and sentence. On collateral appeal, newly retained defense counsel again raised the issue of Hummel's competency to stand trial, couched in terms of trial counsel's ineffectiveness. At the Post Conviction Relief Act ("PCRA") hearing, the trial judge heard testimony from several lay witnesses and a psychiatrist who had examined Mr. Hummel post-trial. That expert concluded that petitioner was presently incompetent and unable to communicate effectively with counsel. The trial court ultimately dismissed the PCRA petition. In doing so, the trial court made the following findings of fact:

- Trial counsel acknowledged that the expert reports obtained before the preliminary hearing opined that his client was competent to stand trial, but he remained ready to "re-visit" the issue of Hummel's competency if necessary.

- Trial counsel discussed with his client the criminal charges filed against him; the legal options available to him, specifically the defense of provocation; and the procedures that would follow preliminary hearing. Counsel indicated that his client acknowledged this information as it was explained to him.

- Regarding the provocation issue, trial counsel discussed Hummel's wife's

infidelity (of which Hummel had learned the day of the shooting and referred to in his note addressed to the couple's children) and the couple's financial troubles. Further, Hummel suggested questions to counsel during the preliminary hearing, and aided counsel in the jury selection process, thereby assisting in his defense. Based upon these observations, counsel believed Hummel to be competent to stand trial, contrary to reports he had received from Hummel's parents/legal guardians.

- Despite Hummel's sight deficiencies, Hummel acknowledged and responded to counsel's questions at every stage of the proceedings. Moreover, during the pathologist's trial testimony, counsel suspected Hummel knew more about circumstances surrounding the shooting than he had previously led counsel to believe. Specifically, as the District Attorney asked the pathologist to explain the source of marks on the victim's face, Hummel stated to counsel, "They will never know what caused those injuries, but I can tell you it was not the gun." When questioned further regarding his comment, however, Hummel offered no details. Finally, during the Commonwealth's closing argument, Hummel repeatedly yelled comments regarding his wife's sexual escapades, referring to an alleged

statement she had said to him shortly before her death.

The trial court based its decision denying PCRA relief in part on testimony of other witnesses who had interaction with Hummel shortly after the incident and the trial, wherein Hummel displayed rational thought, lucidity and recall of events. The trial court considered, and ultimately rejected, the testimony of Hummel's newly acquired expert psychiatrist due to the limited time the doctor had spent with Hummel some three and one-half years following trial. Notably, certain of the new doctor's findings did not differ significantly from the previous two experts; the doctor opined that Hummel understood concepts associated with a criminal trial and was aware of the charges against him. The doctor's conclusion that Hummel was incompetent centered on Hummel's ability to collaborate with counsel in his own defense.

The Superior Court upheld the trial court decision; the Supreme Court again refused to hear the appeal. PCRA counsel filed a petition for federal habeas corpus relief, which the United States District Court for the Western District of Pennsylvania denied. The Third Circuit reversed that decision, granting habeas relief.

REASONS FOR GRANTING THE WRIT

I. **Because The Pennsylvania Superior Court's Rejection Of Hummel's Ineffective Assistance Claim Was Not Contrary To Nor An**

Unreasonable Application Of *Strickland*, Habeas Relief Should Not Have Been Granted.

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which gives practical effect to principles of federal-state comity, permits habeas relief only where a state court's ruling is contrary to, or an unreasonable application of, extant clearly-established controlling precedent of this Court. 28 U.S.C. § 2254(d)(1). The proper construction and application of this standard for relief is of paramount importance; rigorous enforcement of AEDPA's deferential standard promotes finality and the preservation of properly-rendered state court adjudications as well as the orderly administration of criminal justice.

Where, as here, AEDPA's standard is not given its rightful effect because, contrary to this Court's teachings, the reviewing federal court has chosen to substitute its evaluation of the factual record for that of the state court, Petitioners are adversely affected by the unjustified realignment of the state-federal relationship AEDPA ordains. Whenever relief is granted because of erroneous habeas review, the Commonwealth is burdened with the unnecessary obligation to retry cases, either in whole or in part, which unduly taxes already-strained public resources. As in this case, where the state court criminal trial took place more than a decade earlier, this burden is especially acute, because the Commonwealth's presentation of its case is hampered by the passage of time. Witnesses become unavailable and those who do testify find that their

memories have dimmed. It also means that, for no legitimate reason, the victim's surviving family members are forced to endure the anguish associated with new proceedings and/or a retrial. There is no finality, legally or practically speaking.

The Third Circuit's basis for granting habeas relief is indefensible. The court wholly failed to evaluate the state court's decision "through the lens of § 2254(d)(1)." *Price v. Vincent*, 538 U.S. 634, 639 (2003). AEDPA dictates that an application for a writ of habeas corpus shall not be granted "unless the adjudication of the claim . . . resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law." 28 U.S.C. § 2254(d)(1). The phrase "clearly established Federal law" "refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decisions." *Williams v. Taylor*, 529 U.S. 362, 412 (2000). A federal court "may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must be unreasonable." *Williams*, 529 U.S. at 411. Here, the Third Circuit's decision is simply wrong.

When a criminal defendant contends that the attorney was ineffective in representing him, the claim is reviewed under the familiar framework of *Strickland v. Washington*, 466 U.S. 668 (1984). *Strickland* requires a court to determine two things: whether counsel's performance was professionally deficient and whether the defendant was prejudiced

by counsel's deficient performance. 466 U.S. at 687. Failure to satisfy either element requires rejection of the claim. *Id.* At 687.

A. Hummel cannot establish deficient performance.

Under a *Strickland*-based review, there is no basis for relief at all, let alone under the stringent AEDPA standard. The Pennsylvania Superior Court's rejection of Hummel's ineffectiveness claim was neither contrary to, nor an unreasonable application of, *Strickland* – to the contrary, *Strickland* instructs that

> [j]udicial scrutiny of counsel's performance must be highly deferential . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct and to evaluate counsel's perspective at that time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . .

466 U.S. at 689-690. There is no checklist, no "one-size-fits-all" set of rules for measuring counsel's performance. There are a vast number of different approaches that professionally responsible counsel may elect to take in defending an accused. *Id.* at 689-690.

A state court reviewing counsel's performance as part of an ineffectiveness claim must follow *Strickland*'s directions about how to conduct that review, and these very directions invest the state court with a great deal of discretion. A federal habeas court reviewing a state court's decision on collateral attack must be all the more mindful of this when evaluating whether the ruling was contrary to or an unreasonable application of *Strickland*, and must take particular care not to improperly disturb the result when the state court has properly discharged its responsibilities thereunder. There must be an appreciation that a state court's exercise of discretion under *Strickland* may lead to outcomes that are valid even if the reviewing court, considering the claim *de novo*, would not have reached the same outcome. See *Knowles v. Mirzayance*, 129 S.Ct. 1411, 1420 (2009) (explaining that "doubly differential judicial review" applies to *Strickland* claims evaluated under § 2254(d)(1)). "[B]ecause the *Strickland* standard is a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard." *Id.* "The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations." *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004).

The Pennsylvania Superior Court understood and effectuated *Strickland*'s direction for evaluating attorney performance, and conducted a context-based review which found no basis for relief under either of *Strickland*'s prongs. That ruling was consistent with, not contrary to, *Strickland*. It

involved a reasonable application of *Strickland*'s holding. As a result, on habeas review, the state court decision should have been upheld.

By contrast, the Third Circuit's examination of this issue does not take into consideration that sound professional performance must be evaluated contextually; that "Monday morning quarterbacking" is not permitted; and that there is a presumption that counsel was professionally competent. Although the Third Circuit acknowledged *Strickland*, the court in fact did the very thing that this Court said in *Williams* was prohibited by AEDPA: it substituted its judgment for that of the state court.

Not only was it wrong for the court of appeals to re-evaluate counsel's performance and to use that re-evaluation as the basis for granting relief, but the manner in which it did so cannot be reconciled with the type of scrutiny *Strickland* prescribes. In finding it unreasonable that trial counsel did not press for a psychiatric examination or a competency hearing, the panel virtually ignores the "reasonable investigation" that counsel did undertake in delving into his client's competence to stand trial and gives no measure of deference to counsel's reasonable reliance upon the opinions of the two pre-trial medical experts. Trial counsel ***did*** inquire into his client's competency; in fact, it was he who initiated medical review of his client's mental capacity and it was he who petitioned the court for a determination on the issue. Given the initial "indicia of his client's incompetence," trial counsel explored facts concerning his client's mental capacity; he raised the

issue with the trial court, retained an expert to examine his client, and obtained and reviewed reports from his expert as well as from the expert for the Commonwealth. Those reports, however, did not opine that his client was legally incompetent to stand trial.[1] The panel essentially disagrees with the conclusion drawn from the pre-trial expert reports; while the reports may not have been "ringing endorsements" of Defendant's mental abilities, the fact remains that they did not conclude that Defendant was incompetent to stand trial. Irrespective of *Strickland's* recognition of limitations on unfettered investigation, the panel deemed it incumbent upon trial counsel to disregard these reports in search of additional expert testimony. Yet, it is absurd to insist that trial counsel ignore two reports wherein the doctors opined that Defendant was legally competent to stand trial and petition the court for a competency hearing or another mental examination. Rejecting the contention that trial counsel was required to invoke these statutory procedures, the district magistrate stated in his Report and Recommendation:

> [Appellate counsel] argues that [trial] counsel . . . had an "absolute need" to invoke the procedures of the Mental Health Procedures Act. This is not the law of Pennsylvania, however, as both the trial court and the

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[1] In his PCRA testimony, defense trial counsel said that if the reports of the psychologists were negative, the plan was to have his client examined by a psychiatrist, but as a result of the reports indicating competency, he proceeded no further; it was his intention to revisit the issue of competency at any point the issue arose, before trial or during the course of the trial.

> Pennsylvania Superior Court have explained. . . . Because [trial counsel] believed his client to be competent, as an officer of the Court he did not consider it his duty to file a motion to hold a competency hearing merely on the chance that [the trial judge] would find his client incompetent to stand trial. Despite the position of some to the contrary, it is not part of the constitutional obligation of defense counsel to file every available motion, especially ones for which counsel believes there is no sufficient factual basis.

Like all attorneys, Hummel's trial counsel had a duty to make reasonable investigations into the facts and circumstances of the case, but that duty is not unlimited. Counsel may draw a line when they have good reason to think further investigation is unwarranted. *Rompilla v. Beard*, 545 U.S. 374, 382 (2005). In light of the two expert reports that opined Hummel was competent to stand trial, trial counsel was not ineffective for failure to investigate further. The reports provided no medical basis that Hummel was incompetent to stand trial, and aside from his client's parents' insistence, trial counsel had no reason to further inquire into the issue. Thus, counsel made a "reasonable decision" not to press for yet another examination or a competency hearing.

Moreover, counsel's personal observations led him to reasonably believe his client was legally competent to stand trial. Throughout the proceedings, counsel was able to discuss strategy with Hummel. Trial counsel proffered testimony directly contradicting Hummel's post-trial expert's

concern that Hummel was unable to assist in his own defense. Trial counsel stated that Hummel did participate in his own defense, suggesting questions to put to witnesses and the jury venire. Also, *with the assistance of his client*, trial counsel was able to present a cogent defense (provocation) based on evidence of the victim's sexual infidelity and Hummel's outrage upon learning of his wife's extra-marital affair, along with extreme financial duress caused by her extravagant spending habits, designed to mitigate the charge to involuntary manslaughter or even possibly to achieve acquittal altogether. Hummel's incomplete memory of events preceding the murder does not establish incompetence; the test for competency only requires a memory sufficient to permit Hummel to rationally consult with counsel and to reasonably understand the charges and the proceedings against him. If anything, the record affirmatively shows that this threshold was met. Thus, trial counsel was under no obligation to further investigate or again raise his client's competence and his performance was not deficient for failing to do so. The reviewing state court's decision, which rejected Hummel's claim for ineffective assistance of counsel on this record, was not an "objectively unreasonable" application of *Strickland*.

Trial counsel's belief that his client was legally competent was entirely reasonable. After inquiry into his client's competency, trial counsel was satisfied that the legal standards for competency were met in this case; counsel had no reason to doubt Hummel's ability to understand the

proceedings, to communicate with counsel, or to assist in defending the charges brought against him. Consistent with the legal standard for competency, counsel's interaction with Hummel, paired with the experts' reports concluding that Hummel was competent, were sufficient for counsel to reasonably forego a competency hearing. In sum, Hummel's ineffective assistance of counsel claim fails on the first prong of *Strickland* because, considering all the facts, counsel's decision not to pursue a competency hearing, nor to have his client further evaluated, nor to raise the issue yet again with the trial court, was objectively reasonable.

The Third Circuit erroneously accepted Hummel's mischaracterization of the language in the pre-trial order as trial counsel's "stipulation" to his client's competency to stand trial. Despite the unfortunate phrasing of the order, the PCRA opinion makes clear that the court based its determination solely on the opinions within the experts' reports, and thus supports the contention that trial counsel agreed to nothing more than the content of the reports.

> The record is clear that Petitioner was extensively examined by two (2) psychologists (one employed by the Commonwealth and the other by Defendant). ***Both psychologists agreed and concluded that the Petitioner was competent to stand trial.*** After a meeting with the District Attorney and Trial Counsel, this ***Court ruled that based on the findings of both psychologists, the Petitioner was competent to stand trial.***

> Furthermore, this Court observed the Defendant during trial and did not observe any dramatic change in his appearance or behavior throughout the proceedings. Therefore, ***based on the findings of the two (2) psychologists and its own observations during the proceedings, Petitioner's claim that he [was] incompetent is without merit*** and is hereby denied.

The portrayal of counsel's "agreement" as a "stipulation" is illogical. As the magistrate observed, it would have been unnecessary for the trial court to consider the proffered expert reports had counsel stipulated to his client's competency. And, if trial counsel had "waived" the issue (which under state law he could never do), he would hardly have been prepared to "re-visit" the issue if and when the need arose. It is more likely that, faced with two expert opinions that his client was legally competent to stand trial, counsel agreed that further inquiry at that time into the competency issue was not necessary. In sum, counsel did not stipulate to his client's competency; that decision remained within the full and exclusive purview of the trial judge.

In reviewing the adequacy of counsel's performance, the Third Circuit invoked the ABA Guidelines, beginning its analysis with the proposition that "[a]s soon as practicable the lawyer should seek to determine all relevant facts known to the accused." ABA Standards for Criminal Justice, Standard 4-3.2(a) (1991). This inquiry is irrelevant to the issue; what Hummel knew or could recall regarding the incident is not germane to the

question of his competency to stand trial. The Commonwealth is aware of no authority that mandates recall of the event of which one is accused as a precursor to a determination that one is competent to stand trial; on the contrary, the standard is relatively low – is the accused (1) generally aware of the criminal charges and proceedings against him and (2) able to consult with his attorney regarding his defense to those charges. All but ignored in the court's analysis, trial counsel did discharge his professional duty to protect the accused by promptly obtaining psychiatric examination of the accused when the need appeared. See ABA Standards for Criminal Justice, Standard 4-3.6 (1991). Moreover, this Court has emphasized that the guidelines are just that – guidelines to determine what is reasonable. *Strickland*, 466 U.S. at 688; *Wiggins v. Smith*, 539 U.S. 510, 524 (2003). Yet, the Third Circuit's decision elevates the guidelines to the status of constitutional requirements.

Finally, trial counsel cannot be faulted for failing to pursue Hummel's claim of incompetence. A defendant is presumed competent; he must prove otherwise by a preponderance of the evidence.[2] 50 P.S. § 7402(d), § 7403(a). Under prevailing state and federal law, if one is "substantially unable to understand the nature or object of the proceedings against him or to participate and assist in his

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[2] In the interim between Mr. Hummel's trial and appellate review, the Pennsylvania standard was changed from "clear and convincing evidence" to comply with *Cooper v. Oklahoma*, 517 U.S. 348 (1996).

defense" then he is deemed incompetent to stand trial. 50 P.S. § 7402(a); see *Commonwealth v. Kennedy*, 305 A.2d 890 (Pa. 1973) (citing *Dusky v. United States*, 362 U.S. 402 (1960)). Hummel's asserted incompetence is based on his alleged inability to meaningfully participate and assist in his defense given his alleged limited ability to communicate effectively with counsel.[3] In rejecting Hummel's claim that he was incompetent at the time of trial, the PCRA court opined as follows [emphasis added]:

> Petitioner also alleged that Trial Counsel was ineffective due to his alleged failure to request that the Court make inquiries of Petitioner as to his competency before and during his trial. . . . First, the record shows that Petitioner's Preliminary Hearing was continued five (5) times, at the request of the Petitioner, in order that appropriate psychological testing could take place. In regards to the overall proceedings, ***Trial Counsel testified that he never felt that he had a communication problem with Petitioner.*** As a matter of fact, ***Trial Counsel stated that Petitioner would acknowledge the comments that counsel made to him and aided counsel with certain tactics during the overall proceedings.*** Moreover, this Court, itself, could have revisited the issue of Petitioner's competency by its observations of him during

[3] The record reflects that all three medical experts substantially agreed that Mr. Hummel was able to understand the nature or object of the proceedings against him.

> trial. However, as stated before, there was no dramatic change in Petitioner's appearance or conduct.

Significantly, neither pre-trial expert report opined that Hummel was incompetent to stand trial; consequently, there was no medical evidence to rebut the presumption of competency at the time of trial. The trial court judge, sitting in review of Hummel's PCRA, permissibly rejected conflicting expert testimony and accepted the earlier medical opinions, in again determining that Hummel was competent at the time of trial. The trial judge's observation of Hummel for any indication of incompetence during trial, corroborated rather than contradicted his finding of competency. Simply, Hummel has not and can not meet his burden of demonstrating, even under a "preponderance of the evidence" standard, that he was not competent to stand trial. Lastly, it is significant that none of the parties empowered under the statute to question Hummel's competence to stand trial sought to do so. No one, not the district attorney, the trial judge, the warden, or any of the myriad of healthcare providers attending Hummel, ever felt the need to request that he undergo a competency exam. Implementing the undisputed review standards that afford substantial deference to the findings of the state trial court, there was no ineffective assistance of counsel in presentation of the issue of competency and no abuse of discretion connected with the determination that Hummel was competent to stand trial. The record, specifically the pre-trial expert medical reports and the PCRA testimony of counsel and others, along

with the trial judge's personal observations of Hummel, as stated in the judge's opinion, amply supports the trial court's finding of competency.

B. Hummel cannot establish prejudice.

Even assuming without deciding that trial counsel's performance was constitutionally deficient, Hummel cannot show prejudice – that is, he cannot establish "a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different," *Strickland*, 466 U.S. at 694, i.e., the trial court would not have determined that Hummel was competent to stand trial. Nor can Hummel show that it was objectively unreasonable for the Pennsylvania Superior Court to reach that conclusion.

The Third Circuit summarily asserts that there was a "reasonable probability" that but for trial counsel's alleged ineffectiveness, Hummel would have been found incompetent to stand trial, based in large part on the undue credence they give the PCRA testimony of Hummel's medical expert hired post-trial.[4] Frankly, the court is mistaken; there is

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[4] The panel suggests that they are not bound to accept the state court's finding that Hummel was not prejudiced because the basis for the decision was contrary to clearly established United States Supreme Court precedent, in that the appellate court evaluated the claim against a too stringent standard that Hummel did not definitively show that an examination, if ordered, would have established that he was incompetent by clear and convincing evidence. As discussed above, under the appropriately relaxed standard, the outcome would have remained the same and hence the fact remains that Hummel still cannot establish the requisite prejudice.

no reasonable likelihood that this testimony would have dictated a different decision by the trial judge. Notably, the judge who presided over trial also sat in judgment of the collateral PCRA challenge; after hearing extensively from Hummel's newly hired expert, the judge's opinion remained steadfast -- Hummel was competent to stand trial. The trial court judge permissibly rejected the newly obtained (conflicting) expert testimony and accepted the earlier medical opinions, the lay witnesses' and trial counsel's testimony, and his own observations of Hummel in again determining that he was legally competent at the time of trial. Accordingly, as the judge was unpersuaded by additional evidence from the PCRA hearing, it follows that he would have been equally unwavering in his initial opinion that Hummel was competent to stand trial. Hence, the reasonable probability is that even had trial counsel pressed for a competency hearing immediately prior to or at the time of trial wherein the trial judge would have heard the additional expert testimony, the outcome would have remained the same, i.e., the trial court would have found Hummel legally competent to stand trial. Consequently, Hummel did not and can not demonstrate that, but for trial counsel's alleged deficient performance, a different outcome was reasonably probable; therefore, he did not and cannot demonstrate prejudice and his claim of ineffective assistance of counsel must fail.

In addition, the panel asserts that in view of the ambivalent reports from the two psychologists who examined Hummel pre-trial, it was "probable" that the trial court would have directed further inquiry

into Hummel's mental state had trial counsel invoked statutory procedures to explore Hummel's questionable competency. But it was precisely these "ambivalent" reports upon which the trial court concluded that Hummel was competent. In rejecting Hummel's PCRA claims, the trial court opined as follows:

> The record is clear that Petitioner was extensively examined by two (2) psychologists (one employed by the Commonwealth and the other by Defendant). Both psychologists agreed and concluded that the Petitioner was competent to stand trial. After a meeting with the District Attorney and Trial Counsel, this Court ruled that based on the findings of both psychologists, the Petitioner was competent to stand trial.
>
> Clearfield County Court of Common Pleas Opinion on Post-Conviction Relief Act Petition dated, June 24, 1999, Appendix 21

Moreover, under those same statutory procedures, the trial court is permitted to *sua sponte* order a competency examination of defendant, even without a hearing. Although empowered to do so, the trial judge was not compelled to convene a hearing or order an additional examination, based on his continual observations of Hummel as well as the medical reports. As the trial court did not avail itself of the statutory means to revisit its initial determination that Hummel was competent, it is equally unlikely that it would have done so upon suggestion of defense counsel. Thus, Hummel

cannot show a reasonable probability that had trial counsel applied for a competency hearing, the trial judge would have exercised his discretion and ordered further psychiatric testing or granted a hearing.

Second, Hummel failed to demonstrate that such a hearing or a psychiatric evaluation would have established, by a preponderance of the evidence, that he was incompetent to stand trial. The trial court is not bound by the testimony of an expert to the exclusion of all other evidence supporting a contrary opinion; a trial court may resolve conflicts in testimony of expert witnesses, accepting one opinion over another where the record adequately supports it. The trial judge had the benefit of two reports from doctors, whose expertise and foundation for their opinions was never questioned, supporting the trial judge's personal observation that Hummel was competent to stand trial. Hummel's post-trial expert based his opinion that Hummel was incompetent to stand trial on his perception that Hummel was unable to assist counsel in his defense, a fact directly refuted by trial counsel. Hence, the trial court did not err in rejecting his testimony and crediting other expert testimony. Although the trial court was not obligated to rule as it did, Hummel has not shown that the factual rulings were unreasonable. This being the case, the state court cannot be said to have engaged in an unreasonable application of the *Strickland* standard.

In contravention of the principles underlying the AEDPA, the Third Circuit impermissibly and inappropriately substituted its judgment for that of

the Pennsylvania state courts. The court failed to give the requisite deference to the state court's factual determinations and erroneously concluded that the state court's decisions involved an objectively unreasonable application of clearly established legal principles under U.S. Supreme Court precedent. When the proper inquiry is taken and the appropriate deference is given to the factual findings of the Pennsylvania post-conviction courts, it is clear that trial counsel's performance was constitutionally adequate. The Pennsylvania appellate court's opinion cited state case law setting forth the correct federal standard for evaluating ineffective assistance claims and correctly concluded that counsel's performance was not ineffective. The state court's decision to deny relief under *Strickland* was neither contrary to nor an unreasonable application of controlling precedent. Accordingly, this Court should grant review to correct the Third Circuit's approach to reviewing Hummel's Sixth Amendment claims.

CONCLUSION

For the above reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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September 24, 2009

Supreme Court, U.S.
FILED
09-376 SEP 24 2009
OFFICE OF THE CLERK

No. 06-2711

IN THE
SUPREME COURT OF THE UNITED STATES

FREDERIC ROSEMEYER, *et al.*,
Petitioner

v.

EDWARD V. HUMMEL,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

APPENDIX

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COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee	:	
v.	:	
EDWARD V. HUMMEL,	:	No. 00393 PITTSBURGH 1993
Appellant.	:	

Appeal from the Judgment of Sentence February 05, 1993, In the Court of Common Pleas of Clearfield County, CRIMINAL, No. 92-229-CRA.

BEFORE: CAVANAUGH, McEWEN, and BECK, JJ.

MEMORANDUM: FILED: NOVEMBER 19, 1993

Appellant, Edward V. Hummel appeals from the judgment of sentence. Appellant was convicted by jury of murder in the first degree and aggravated assault. He was sentenced to life imprisonment for murder and to a concurrent sentence of five to ten years for aggravated assault. We affirm.

Appellant shot and killed his wife in their home. Shortly after notifying some of his family members, appellant shot himself in the head.

On appeal, appellant questions the court's determination that he was competent to stand trial in light of his self-inflicted gun shot wound. Experts for both the defense and prosecution agreed appellant was competent to stand trial as long as the court proceedings were modified to account for appellant's physical and mental restrictions.

Appellant argues that he should be adjudged incompetent based upon two instances that occurred during the trial. First, while the Commonwealth's ballistics expert was testifying, appellant placed his head on the defense table and gave the appearance of being asleep. When appellant could not be aroused by his counsel, appellant's counsel approached the bench and discussed appellant's condition with the trial court. The trial judge asked appellant's counsel if he wanted to proceed with the remaining testimony of the ballistics expert or take a short recess in order to allow his client to rest. Appellant's counsel decided to proceed with the testimony on the basis that the testimony was technical in nature.

Second, during the district attorney's closing argument, appellant interrupted the district attorney and shouted that the district attorney should tell the jury about certain sexual acts that his wife had committed while she was engaged in an extramarital affair. Appellant then placed his head on the table and appeared to be weeping.

The Commonwealth asserts that appellant's counsel has waived the issue of appellant's mental competency by failing to object during the trial.

Ordinarily, a party must make timely and specific objections at trial in order to preserve the issue for review. Commonwealth v. Smith, 414 Pa. Super 208. 606 A.2d 939 (1992). Our supreme court has stated, however, that "the question of competency is an issue that cannot be effectively waived." Commonwealth v. Silo, 469 Pa. 40, 364 A.2d 893, (1976). See also Commonwealth v. Clark, 300 Pa. Super. 315, 446 A.2d 633 (1982). Accordingly, the issue is properly before us.

Appellant contends that the trial court erred in ruling that he was competent to stand trial. The mental competence of an accused is regarded as a basis condition to a fair trial. Commonwealth v. Marshall, 456 Pa. 313, 318 A.2d 724 (1974) (citing Commonwealth v. Bruno, 435 Pa. 200, 255 A.2d 519, 522 (1969)). Due process requires that an accused be legally competent before standing trial on a criminal charge. Commonwealth v. Garnett, 336 Pa. Super. 313, 485 A.2d 821 (1984). The test of an accused's competency is set forth in 50 Pa. C.S.A. § 7402(a):

> Whenever a person who has been charged with a crime is found to be substantially unable to understand the nature or object of the proceedings against him or to participate and assist in his defense, he shall be deemed incompetent to be tried, convicted or sentenced so long as such incapacity continues.

An individual asserting mental incompetency to stand trial has the burden of proving incompetency by clear and convincing evidence. 50 Pa. C.S.A. §

7403(a) and the trial judge's decision as to competency rests within the discretion of the trial judge whose determination will not be reversed unless it is unsupported by the record. Commonwealth v. Hazur, 372 Pa. Super 306, 539 A.2d 451 (1988).

Accordingly, we must review the record to determine whether appellant was unable to comprehend his position as one accused of a crime and was unable to assist his counsel in presenting a rational defense. Appellant cites to the two specific instances mentioned above as evidence of his incompetency. These instances do not demonstrate that the trial court erred. The Supreme Court of Pennsylvania has stated that "the incomprehensibility, the bizarreness of someone's behavior is not, nor can it be, determinative of his . . . competency to stand trial." Commonwealth v. Banks, 513 Pa. 318, 521 A.2d 1, 16 (1987). Appellant's falling asleep during technical testimony and his outburst during the district attorney's closing are insufficient to show that appellant was unable to comprehend the trial process and was unable to cooperate with his counsel. Therefore, we hold that the trial court did not err in its determination that appellant was competent to stand trial.

Judgment of sentence affirmed.

SUPERIOR COURT OF PENNSYLVANIA
PITTSBURGH DISTRICT

COMMONWEALTH OF PENNSYLVANIA	:	NO.393 PITTSBURGH 1993
v.	:	
EDWARD VINCENT HUMMEL, APPELLANT	:	

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of CLEARFIELD County be, and the same is hereby JUDGMENT OF SENTENCE AFFIRMED.

BY THE COURT:
/s/ Eleanor R. Valecko
DEPUTY PROTHONOTARY

DATED: NOVEMBER 19, 1993

IN THE COURT OF COMMON PLEAS OF
CLEARFIELD COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	
v.	:	NO. 92-229-CRA
EDWARD V. HUMMEL,	:	

FINDINGS OF FACT

1). On November 22, 1991, the Petitioner severely beat his wife at their residence. Immediately thereafter, the Petitioner shot and killed his wife.

2). Sometime shortly after notifying some of his family members that he had killed his wife, the Petitioner returned to his home and shot himself.

3). Charges of Criminal Homicide and Aggravated Assault were later filed by the Pennsylvania State Police against the Petitioner following his discharge from a series of hospitals and a rehabilitation center (Nittany Valley Rehabilitation Center).

4). The Petitioner was represented by the Office of the Public Defender of Clearfield County, more specifically, F. Cortez Bell, III, Esquire (hereinafter "Trial Counsel").

5). Trail Counsel testified that since 1979, he has practiced criminal law in Pennsylvania and has been a constant member of the Public Defender's Office in Clearfield County for the last ten (10) years (TR-9).

6). The Testimony of Trial Counsel is found to be credible and persuasive for the following reasons:

a). Trial Counsel testified that prior to the Preliminary Hearing of Defendant, Trial Counsel for the Petitioner filed five (5) separate petitions for continuances before the Court of Common Pleas in Clearfield County.

b). Trial Counsel had requested the continuances in order that appropriate psychological testing could be performed on Petitioner in order to determine whether he was competent to stand trial.

c). Trial Counsel testified that on five (5) separate occasions, this Court granted Petitioner's requests of continuances of the Preliminary Hearing.

d). Trial Counsel testified that during a six (6) month period between the filing of the original Petition for Continuance and the Preliminary Hearing (March 10, 1992 to August 12, 1992), the Petitioner was examined by two separate psychologists, Dr. Vincent F. Berger (Appellant) and Dr. Allen M. Tepper (Commonwealth).

e. Both doctors, Dr. Berger (Appellant) and Dr. Tepper (Commonwealth), received and reviewed the medical records of the Petitioner and met

with him personally for the purpose of a competency evaluation.

f). Both psychologists, Dr. Berger (Appellant) and Dr. Tepper (Commonwealth) concluded and agreed that the Petitioner was competent to stand trial, however, both psychologists outlined certain physical and mental restrictions for the Petitioner in their respective reports which would have to be taken into account for the purpose of conducting the jury trial.

g). On August 7, 1992, the Commonwealth filed the report of Dr. Tepper with this Court while on August 10, 1992, Trial counsel of the Petitioner filed the report of [its] psychologist, Dr. Berger.

h). On August 7, 1992, three (3) days before counsel for the Petitioner filed the report of it's psychologist, Trial counsel for the Defendant filed a petition with this Court requesting the Court to determine his competency.

i). On August 10, 1992, following a review of the reports that had been filed by the Commonwealth and Petitioner, this Court issued an Order, upon the agreement of the parties, that based upon the findings of both psychologists, the Petitioner was competent to stand trial with certain physical and mental restrictions for trial purposes that this Court specifically noted in the Order.

j). During the Preliminary Hearing on August 12, 1992, Trial Counsel testified that he discussed

with Petitioner, as he does with all his clients, the criminal charges filed against him, what were his legal options, and the procedures that would follow (TR-20).

k). Trial Counsel testified that he had a discussion with Petitioner before the Preliminary Hearing about the suicide note that he had left concerning his wife's Infidelity (TR-20).

l). Trial Counsel testified that he explained the charges, especially, the difference between homicide and voluntary manslaughter, the defense of provocation and other matters with Petitioner (TR-20).

m). Trial Counsel testified that Petitioner acknowledged what counsel was explaining to him at the Preliminary Hearing (TR-20).

n). During the Preliminary Hearing, Trial Counsel testified that Petitioner aided in his defense by suggesting questions to counsel (TR-22).

o). Trail Counsel testified that Petitioner was on bail and resided with his parents in Wallacetown, Pennsylvania (approximately 15 miles from Clearfield) between the preliminary hearing and Petitioner's jury selection (TR-23, 24).

p). Trial Counsel testified that he had extensive contact with the parents of Petitioner before Petitioner's jury selection. (TR-24).

q). Trial Counsel testified that the parents/guardians of Petitioner told him Petitioner was not competent to speak to him, Petitioner was "sliding backwards" and had no hope for recovery. (TR-24).

[r).] The parents/guardians provided Trial Counsel with information, financial statements, and a list of witnesses that would aid in the defense of their son at the time of trial. (TR-24).

s). Trial Counsel testified that he relied on the information that Petitioner's parents/guardians had provided to him in regards to Petitioner's condition and that he was prepared to re-visit the issue of competency with the court (TR-25).

t). Trial Counsel testified that Petitioner attended jury selection.

u). Trial Counsel testified that during jury selection, Petitioner consulted with counsel and aided him in the jury selection process (TR-25).

v). Based on his observations and conversations with Petitioner during his jury selection, Trial Counsel testified that Petitioner was competent, contrary to the reports that he received from the Petitioner's parents/guardians (TR-20).

w). Trail Counsel testified that when the situation called for it, he was prepared to "re-visit" the issue of Petitioner's competency (TR-26).

x). Trial Counsel testified that he had sufficient information about Petitioner's case from Petitioner's parents/guardians, other sources and did not discuss the matter with Petitioner (TR-28).

y). Trial Counsel testified that it was his strategy to refrained from discussing specifics of the murder with the Petitioner because if Petitioner recalled anything, it would ruin the issue of incompetency that trial counsel was trying to set up for trial (TR-28, 29).

z). Trial Counsel testified and agreed with Petitioner's counsel that under the law of Pennsylvania there is a procedure for determining competency (TR-30).

i). Trial Counsel testified that by his observations and conversations with Petitioner during jury selection and over the course of the trial, he did not feel that it was in his client's best interests if the judge were to question Petitioner as to his competency (TR-30).

ii). Trial Counsel testified that he would verbally describe to Petitioner what was happening in the courtroom due in pact to Petitioner suffering from certain sight deficiencies (TR-37).

iii). Trial Counsel testified that despite Petitioner's sight deficiencies, Petitioner was acknowledging and responding to his counsel's questions and remarks at every stage of the proceedings (TR-37).

iv). Trial Counsel testified that during the testimony of pathologist, he realized that the Petitioner may have know more about the circumstances surrounding the murder than he had let on to his counsel (TR-38).

v). Trial Counsel testified that as the District Attorney handed a ruler to the pathologist to measure the distance from the sight to the hammer of the gun used in the killing to explain to the jury how the marks may have been made on the face of the victim before she was killed, Defendant said to Trial Counsel, "They will never know what caused those injuries, but I can tell you it was not the gun." (TR-39).

vi). Trial Counsel testified that he objected and counsel approached the bench and the Court called a recess. During the recess Trial counsel further questioned the Petitioner on his comments, however, Petitioner just repeated the statement, but, would not say anything else to counsel (TR-39).

vii). Trial Counsel testified that he had no idea what was causing Petitioner's lack of willingness to discuss the matter with him (TR-39).

viii). Trial Counsel did not think it was appropriate to discuss the matter with the court due to his trial strategy to have Petitioner's competency become an issue during trial (TR-40).

ix). Trial Counsel testified that when it came time during the trial to decide whether or not to have the Petitioner testify, he discussed the

matter with Petitioner and his father, who was seated at the defense table with Petitioner (TR-34).

x). Trial Counsel testified that he told the Petitioner that he did not have to testify and if he didn't testify that by declining to do so could not be held against him, however, if he chose to testify the more he recalled, the chance of any claims of incompetency that he wished to raise during the course of trial or on appeal would be hurt (TR-34).

xi). Trial Counsel testified that he, the Petitioner, and Petitioner's father made the decision that Petitioner would not testify (TR-34).

xii). Trial Counsel testified that he believed that Petitioner was competent to testify, however, he was not sure that he was competent to testify in his own defense (TR-36-37).

xiii). During the Commonwealth's closing argument to the jury, the Petitioner burst out and said "Tell them about the blow jobs" [sic] (TR-40).

xiv). Trial Counsel testified that as soon as the Petitioner said the phrase as mentioned above, he and Petitioner's father, seated at the same table, attempted to covered Petitioner's mouth with their hands (TR-40).

xv). Trial Counsel testified that Petitioner was removed from the courtroom and continued to

struggle to say the same phrase over again (TR-41)

xvi). Trial Counsel testified that during a short recess, Defendant was not in physical condition to speak to him (TR-43).

xvii). Trial Counsel testified that the court inquired whether counsel wanted Petitioner back into the courtroom for the remainder of closing argument of Commonwealth and the reading of jury instructions, but Trial Counsel stated that he did not want the Petitioner back into the courtroom because he didn't know what kind of control he would have over him (TR-43).

xviii). Trial Counsel testified that he preserved the issue of competency in Post Trial Motions and his Appeal to the Superior Court (TR-51).

6). Pam Letty testified on behalf of the Commonwealth during these proceedings. This Court finds her testimony to be credible and persuasive as to the following:

a). She had been employed by the Clearfield County Area on Aging as a caseworker.

b). She came to know the Petitioner in 1992.

c). Pamela Letty testified that both she and Petitioner had initiated conversations and she recalled his conversations about his building his own home and his interest in stereo equipment.

7). Lena Hummel testified in this matter. This Court finds her testimony to be credible and persuasive as to the following:

a). Petitioner's oldest daughter testified about a telephone call from Petitioner about a month after he murdered her mother.

b). Hummel testified that Petitioner inquired as to various specific events, the strike at Philipsburg School District and her boyfriend, Dave, which had been occurring in his daughter's life at the time that her mother was murdered.

c). Lena Hummel also testified that her father sounded very normal at the time of the phone call.

8). Janelle Hummel, Petitioner's younger daughter, testified at the hearing. This Court finds her testimony to be credible and persuasive as to the following:

a). She corroborated her sister's testimony about the telephone call that the Petitioner placed a month after the murder of her mother.

b). She indicated that Petitioner inquired about whether she was skating at the pond (something that she enjoyed every winter).

c). Hummel further testified that Petitioner sounded very normal and there was nothing unusual about the way he talked to her.

9). The defense had Dr. Robert Wettstein, a psychiatrist, testify on behalf of the Petitioner.

10). The testimony of Dr. Robert Wettstein is found not to persuasive by the Court due to the following:

a). Dr. Wettstein interviewed the Petitioner for only three (3) hours to form the basis of his report submitted to the Court;

b). Dr. Wettstein did not examine Petitioner until August 1996, almost three and one-half (3½) years following trial.

OPINION AND ORDER

Petitioner raised several issues in his P.C.R.A.:

1) The appeal to the Superior Court in this matter did not waive the issue of Defendant's incompetence nor the issue of his incompetence res judicata;

2) Defendant was denied the effective assistance of counsel in violation of Article I, Section 9 of the Pennsylvania Constitution and denied due process and equal protection of the law in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution;

3) Defendant was also denied the effective assistance of counsel pursuant to 42 Pa.C.S.A. Section 9543(a)(2)(ii) as follows:

a) Trial Counsel erred in failing to seek a change of venue or venire due to pretrial publicity;

b) Trial Counsel erred in failing to challenge the array of petit jurors in Clearfield County because jury pools are drawn from only per capita tax rolls, resulting in a disproportionately low number of young people (ages 18 to 35), poor people and minorities;

c) Trial Counsel erred in failing to prepare any adequate questions for prospective jurors, particularly geared to whether prospective jurors could fairly consider the lesser offense of voluntary manslaughter;

d) Trial Counsel erred in failing to request individual voir dire of prospective jurors;

e) Trial Counsel erred in failing to interrogate Defendant to determine whether he was competent to stand trial and to determine critical facts about which he was able to testify because of his ability to respond to simply directed questions;

f) Trial Counsel erred in failing to determine whether Defendant was able to knowingly, voluntarily and intelligently waive his right to testify;

g) Trial Counsel erred in failing to request the Court to make inquiries of Defendant as to his competency between August 1992 and at the time of trial in 1993;

h) Trial Counsel erred in failing to seek offers of proof and not objecting to the testimony of witnesses Leonard Martin, Larry Putt, Ellsworth Coble, Janelle Hummel, and Lena Hummel

relative to alleged threats to the victim or alleged assaults upon the victim by Defendant;

i) Trial Counsel erred to effectively cross examine the same witnesses as mentioned in subparagraph "h";

j) Trial Counsel erred in failing to summoning character witnesses relative to Defendant's reputation for being peaceful and law abiding;

k) Trial Counsel erred in failing to discuss the rebuttal witnesses and the persons named by rebuttal witnesses with Defendant's family in order to conduct an effective examination of them;

l) Trial Counsel erred in failing to investigate the rebuttal witnesses and the persons named by them and in not requesting the Court for a reasonable recess within which to do so;

m) Trial Counsel erred in failing to seek an offer of proof as to the witness Thomas Dixon in rebuttal and in failing to object to his testimony about his observations in the Hummel household on July 4, 1989;

n) Trial Counsel erred in failing to make inquiry of Pauline Hummel, Defendant's mother, on direct examination about information she provided to counsel that she learned from Defendant after her initial testimony;

o) Trial Counsel erred in erroneously advising the jury that mere words are insufficient

to provide sufficient provocation to reduce an intentional killing to manslaughter;

p) Trial Counsel erred at trial to place the remarks that Defendant uttered during the closing argument by the District Attorney on record;

q) Trial Counsel erred by having Defendant ushered out of the courtroom after his remarks during the District Attorney's closing argument and agreeing to his absence during the balance of the District Attorney's closing argument and the jury instructions; and

r) Trial Counsel erred in failing to object to and to move for a mistrial when the District Attorney made a comparison of provocation;

Ineffective assistance of counsel provides a basis for relief under the P.C.R.A. only when it "so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place." 42 Pa.C.S. Section 8543(a)(2)(ii). "To warrant relief, a defendant must prove that the underlying claim is of arguable merit, counsel had no reasonable basis for the act or omission in question, and, but, for counsel's act or omission, the outcome of the proceedings [547 Pa. 200] would have been different." Commonwealth v. Douglas, 537 Pa. 588, 645 A.2d 226 (1994), *citing* Commonwealth v. Pierce, 515 Pa. 153, 527 A.2d 973 (1987). Furthermore, "allegations of ineffective assistance of counsel must be proven by the Petitioner." Commonwealth v. McNeil, 506 Pa. 607, 487 A.2d 802 (1985). Also, "such issues may not be raised in a vacuum."

Commonwealth v. Baker, 531 Pa. 541, 614 A.2d 663 (1992).

Initially, "representation by counsel is presumed to be effective; therefore, the defendant has the burden of establishing ineffective assistance of counsel." Commonwealth v. Jones, 408 Pa. Super. 337, 596 A.2d 885 (1991). "To trigger a review of an allegation of ineffectiveness of counsel, the defendant must allege in detail the basis for claiming that counsel's act or omission that deprived the defendant of his or her right to counsel." Commonwealth v. Lassen, 442 Pa. Super. 298, 659 A.2d 999, 1007 (1995). "Where the defendant asserts a general claim of ineffectiveness without reference to evidence of record or specific facts demonstrating prejudice by reason of counsel's error, relief will be denied on the grounds that the claim is waived." Commonwealth v. Crawley, 541 Pa. 408, 663 A.2d 676, 681 (1995).

In the case at bar, the Petitioner raised the issue of competency by Post Trial Motion and later to the Superior Court as a matter of right following a trial by jury. The Superior Court affirmed the Trial Court's determination as to Defendant's competency. "If an issue is first raised in the Trial Court and later litigated in the Pennsylvania Superior Court on appeal, it is later ineligible for P.C.R.A. relief." Commonwealth v. Szuchon, 548 Pa. 37, 693 A.2d 959 (1997).

However, Petitioner asserts his counsel was ineffective because Petitioner was not competent to waive the issue of competency. This Court will

discuss all of Petitioner's issues that incorporate the "competency" issue throughout his P.C.R.A. (Defense Issues, No. 1, 7, 8, 9).

It is well-settled that "a person will be deemed incompetent if he is substantially unable to understand the nature or object of the proceedings against him to participate and assist in his defense. . . ." 50 P.S. Section 7402(a). "The determination of a defendant's competency to stand trial rests within the discretion of the trial judge, whose decision will not be disturbed absent a clear abuse of that discretion." Commonwealth v. Sam, 535 Pa. 350, 357, 635 A.2d 603, 606 (1993), *cert. denied*, 511 U.S. 1115, 114 S.Ct. 2123, 128 L.Ed.2d 678 (1994); Commonwealth v. Banks, 513 Pa. 318, 341, 521 A.2d 1, 12 (1987), *cert. denied*, 484 U.S. 873, 108 S.Ct. 211, 98 L.Ed.2d 162 (1987).

The record is clear that Petitioner was extensively examined by two (2) psychologists (one employed by the Commonwealth and the other by Defendant). Both psychologists agreed and concluded that the Petitioner was competent to stand trial. After a meeting with the District Attorney and Trial Counsel, this Court ruled that based on the findings of both psychologists, the Petitioner was competent to stand trial.

Furthermore, this Court observed the Defendant during trial and did not observe any dramatic change in his appearance or behavior throughout the proceedings. Therefore, based on the findings of the two (2) psychologists and it's own observations

during the proceedings, Petitioner's claim that he is incompetent is without merit and is hereby denied.

Petitioner also alleged that Trial Counsel was ineffective due to his alleged failure to request that the Court make inquiries of Petitioner as to his competency before and during his trial. Petitioner makes reference several times to his falling asleep during the trial and his outburst at trial during the closing argument of the Commonwealth. First, the record shows that Petitioner's Preliminary Hearing was continued five (5) times, at the request of the Petitioner, in order that appropriate psychological testing could take place. In regards to the overall proceedings, Trial Counsel testified that he never felt that e had a communication problem with Petitioner. As a matter of fact, Trial Counsel stated that Petitioner would acknowledged the comments that counsel made to him and aided council with certain tactics during the overall proceedings. Moreover, this Court, itself, could have revisited the issue of Petitioner's competency by its observations of him during trial. However, as stated before, there was no dramatic change in Petitioner's appearance or conduct. As the Superior Court stated in it's opinion, quoting the Supreme Court of Pennsylvania:

> "the incomprehensibility, the bizarreness of someone's behavior is not, nor can it be determinative of his . . . competency to stand trial . . . Appellant's falling asleep during technical testimony and his outburst during the District Attorney's closing are insufficient to show that appellant was unable to

> comprehend the trial process and was unable to cooperate with counsel."

Commonwealth v. Hummel, 433 Pa. Super. 651, 639 A.2d 839, *cert. denied*, 537 Pa. 647, 644 A.2d 733 (1994).

Therefore, Petitioner's claim is without merit and is hereby denied.

Petitioner also contends that Trial counsel failed to meet with Petitioner between his preliminary hearing and jury selection to discuss trial strategy. It is Petitioner's contention that by failing to do so, Trial Counsel could not prepare adequately for a proper presentation of Petitioner's defense. Petitioner's claim is without merit.

Trial Counsel testified that due to the required physical care necessary for Petitioner, he was released on bail to his parents. Petitioner resided at his parents/guardians' residence throughout the proceedings. Trial Counsel testified that on several occasions he called the residence to speak to the Petitioner. Trial Council further testified that his parents/guardians would tell him each time that Petitioner was unable to talk to him or see him due to his deteriorating condition. It is clear to this Court that the parents/guardians of Petitioners believed that their son was incompetent, in spite of the psychologists' findings, and in effect, refused Trial Counsel the opportunity to discuss strategy with him or see him until jury selection. It is also clear to this Court that Trial Counsel and the parents/guardians of Petitioner discussed strategy on a continuing basis. When Petitioner reported for

jury selection, the Court observed Petitioner aiding in the challenges and selection of jurors. Trial Counsel confirmed the same during his testimony at the P.C.R.A. Hearing. Now Petitioner attempts to claim that Trial Counsel was ineffective because counsel did not meet with him personally between the preliminary hearing and jury selection to develop evidence as to his defense. It is well-settled that "the length of time that trial counsel spends with defendant does not, by itself, imply the extent of trial counsel's preparation for trial." Commonwealth v. Bundy, 491 Pa. 607, 421 A.2d 1050, 1051 (1980). Based upon this Court's finding that although Petitioner's parents/guardians interfered with the attempted communications between Trial Counsel and Petitioner, parents/guardians did continue to provide information and discuss strategy with counsel for their son's defense. Therefore, Petitioner's claim is without merit and is hereby denied.

Petitioner's Petition further asserts that Trial Counsel erred by failing to seek a change of venue or venire due to pretrial publicity. The factors for this Court to consider when presented with a Petition for Change of Venue/Venire due to pretrial publicity are: "1) whether the pretrial publicity was inherently prejudicial, so as to entitle defendant to a new trial based on venue; 2) whether the publicity was factual and objective or consisted of articles that were sensational, inflammatory and demanded conviction; 3) revealed existence of accused's prior criminal record; 4) referred to confessions, admissions or reenactment of the crime by defendant; or 5) was

based on information reported by the police and prosecutorial officers." Commonwealth v. Asker, 545 Pa. 521, 681 A.2d 1305 (1996). It is the defendant who has the burden to demonstrate that the pretrial publicity was inherently prejudicial, that it saturated the community, and the community did not have sufficient time to cool down from the effects of the publicity." Id. The Courts of Pennsylvania have further opined that "the test of a cooling-off period" to determine whether prejudicial effects of pretrial publicity have been significantly diluted, lies in voir dire of potential jurors." Id. Petitioner has failed to produce any evidence that any pre-trial publicity in this matter would call for a change in venue. Therefore, Petitioner's claim is without merit and is hereby denied.

In Petitioner's Petition, Petitioner asserts that Trial Counsel also erred in failing to challenge the array of petit jurors in Clearfield County at the time of jury selection. Petitioner contends that the jury pools in Clearfield County are drawn from only per capita tax rolls, resulting in a disproportionately low number of young people (ages 18 to 35), poor people and minorities.

In Commonwealth v. Craver, 547 Pa. 17, 688 A.2d 691 (1997), the Supreme Court of Pennsylvania held that "in order to establish prima facie violation of the requirements that jury array fairly represent the community, defendant must show: 1) that the group allegedly excluded is a distinctive group in the community; 2) that representation of the group in venires from which juries are selected is not fair and reasonable in relation to the number of such people

in the community; and 3) that under representation is due to systematic exclusion f the group in the jury selection process. Id at 547 Pa, at ___, 688 A.2d at __, *citing* Duren v. Missouri, 439 U.S. at 364, 99 S.Ct. at 688, 58 L.Ed.2d at 586-87 (1979). The court further stated that 'systematic' means caused by or inherent in the system by which juries are selected." Id. Petitioner failed to sustain it's burden as to this issue. Petitioner failed to produce any evidence that would substantiate his claim. Therefore, Petitioner's claim is without merit and is denied.

In other issues of Petitioner's Petition, Petitioner asserts that Trial Counsel erred in failing to prepare any or adequate questions for prospective jurors and Trial Counsel erred by failing to request individual voir dire of prospective jurors. Clearly, the questions that were set forth at jury selection by Trial Council are to be considered part of counsel's trial strategy. This Court would note that the record does not support the heavy burden that Petitioner must demonstrate in regards to ineffective assistance of council as to trial strategy. Thus, Petitioner's claim is without merit and is denied.

In regards to individual voir dire, Pa.R.Crim.P., Rule 1106(e), 42 Pa.C.S.A. states, in part, that:

> "In capital cases, the individual voir dire method must be used, unless the defendant waives that alternative. In non-capital cases, the trial judge shall select one of the following methods of voir dire, which shall apply to the selection of both jurors and alternatives:

(1) *Individual Voir Dire and Challenge System*

(a) Voir dire of prospective jurors shall be conducted individually and may be conducted beyond the hearing and presence of other jurors.

Pa.R.Crim.P., Rule 1106(e), 42 Pa.C.S.A.

Rule 1106(e) mandates individual voir dire in capital cases, however, gives the court options in all other type of cases. Clearly, this is not a capital case, therefore, Defendant did not have the right to individual voir dire. Once again, the Courts of Pennsylvania have viewed this particular issue, with the exception of capital cases, as trial strategy. Review of the record, discloses that voir dire was conducted in accordance with the law and was sufficient to allow trial counsel to uncover prejudices and biases and effectively exercise challenges. Furthermore, the record fails to demonstrate that Petitioner sustained his heavy burden when alleging defense council was ineffective due to his trial strategy.

In regards Issues 3(k), 3(l), 3(m), 3(n), 3(o), 3(p) and 3(q) of Petitioner's P.C.R.A., Petitioner asserts that Trial Counsel was ineffective as to several issues that this Court considers to be part of counsel's trial strategy.

As to offers of proof of the witnesses and the sufficiency of the cross-examination of the same witnesses in Paragraphs 3(k) and 3(l), this Court considers that to be part of counsel's trial strategy.

Upon review of the record, Petitioner's claim is without merit and is hereby dismissed.

As to Paragraph 3(m) of Petitioner's Petition, it is suggested that Trial Counsel failed to summon character witness relative to Defendant's character and having the reputation as being peaceful and law biding. To establish that Trial Counsel's failure to call a witness amounted to ineffective assistance, Petitioner must "establish the existence and availability of the witness, counsel's duty to know of the witness, the witness' willingness to appear on petitioner's behalf, and the necessity for the proposed testimony to avoid prejudice." Commonwealth v. Stanley, 534 PA. 297, 299, 632 A.2d 871, 872 (1993). Petitioner does not, by affidavit or otherwise, set forth the name of a single person who was willing to testify on his behalf as a character witness, must less establish that he was prejudiced by the lack of character witnesses. Therefore, Petitioner is not entitled to relief on this claim.

As to Paragraph 3(n) and 3(o) of Petitioner's Petition, Petitioner alleged that Trial Counsel was ineffective due to his failure to investigate the rebuttal witnesses and the persons named by him and not requesting the Court for a reasonable recess to do so. As part of Defendant's case, counsel presented "good character" witnesses who testified that the Defendant had a good reputation in the community for being honest, truthful, peaceful and law abiding. In rebuttal, the Commonwealth presented several "bad character" witnesses who testified that Defendant's reputation in the

community was exactly the opposite. In response, Defense offered no testimony on surrebuttal. Clearly, this is a matter that concerns the trial strategy of Trial Counsel. By offering witnesses on surrebuttal, those witnesses would be subject to the cross-examination of the Commonwealth. Petitioner failed to establish that he was prejudiced by such a decision not to call witnesses on surrebuttal or ask for a recess to investigate the rebuttal witnesses. Therefore, Petitioner is not entitled to relief on this claim.

As to Paragraph 3(p), Petitioner alleged ineffective assistance of counsel for failure to seek an offer of proof as to the witness Thomas Dixon and failing to object to his testimony. Once again, this is a trial strategy matter. Petitioner failed to demonstrate how this witness caused any prejudice to the Petitioner or that the strategy of trial counsel was unreasonable. The record does not support Petitioner's claim. Therefore, Petitioner is not entitled to relief on this claim.

In regards to Paragraph 3(g) of Petitioner's Petition, Petitioner alleged that Trial Counsel erred by failing to make an inquiry of Pauline Hummel on direct examination about information that her son (Petitioner) had provided to her. Once again, Petitioner's assertion involves trial strategy. Petitioner failed to demonstrate any prejudice that he suffered or the unreasonableness of trial counsel's strategy. Therefore, Petitioner is not entitled to relief on this claim.

In Paragraph 3(r) of Petitioner's Petition, Petitioner alleged that Trial Counsel erred in erroneously advising the jury that mere words are insufficient to provide sufficient provocation to reduce an intentional killing to manslaughter, and citing Commonwealth v. Berry, 461 Pa. 233, 336 A.2d 262 (1975). In Berry, supra., the Supreme Court of Pennsylvania held that while words of an insulting and scandalous nature are not a sufficient cause of provocation, words that convey information of a fact could constitute adequate provocation if the fact is observed. Id. (emphasis added). Moreover, in Berry, the defendant's Mother had been severely beaten and observed by the defendant immediately thereafter causing him to commit the offense. No such actual observation here. Clearly, the record does not demonstrate that Petitioner observed his wife's alleged infidelity and does not support his claim. Thus, Petitioner is not entitled to relief on this claim.

Petitioner's Petition also alleged that Trial Counsel erred when he failed to place the Petitioner's remarks on the record that he made during the closing argument of the Commonwealth's closing. The record is clear that Petitioner failed to show any prejudice that he suffered as a result of the record reflecting that the Defendant's remarks were inaudible. Clearly, if the record did contain Petitioner's remarks, it would be of no avail to him. Once again, this would be part of trial strategy. Petitioner is not entitled to relief on this claim.

Petitioner's further alleged that Trial Counsel erred when he ushered the Petitioner from the

courtroom and agreed to keep him out of the courtroom during the balance of the closing argument by the Commonwealth and the charge to the jury without placing Petitioner's waiver of his right to be present on the record. Trial Counsel testified that when he and the Petitioner's father ushered the Petitioner out of the courtroom and into the law library, Petitioner would not respond to him. Trial Counsel also testified that he agreed to have the Petitioner wait in the law library for the remainder of the closing argument of the Commonwealth and until the jury was charged. The record does not demonstrate in any way that the Petitioner was prejudiced by not being in the courtroom during this time period. Therefore, Petitioner is not entitled to relief on this claim.

Petitioner alleged that trial counsel erred in failing to object and to move for a mistrial when an erroneous, improper and prejudicial comparison was made by the Commonwealth of provocation suffered by Lisa Maines and the provocation suffered by Petitioner. The standard for reviewing whether a closing comments by the prosecution require a grant of a new trial is well-established:

> "The Pennsylvania Supreme Court has consistently held that not every intemperate or uncalled for remark by the prosecutor requires a new trial." Commonwealth v. Green, 525 Pa. 424, 460, 581 A.2d 544, 561 (1990). "A new trial is required only in those instances where the language of the prosecutor is such that its unavoidable effect would be to prejudice the jury, forming in

> their minds fixed bias and hostility toward the defendant, so that they could not weigh the evidence and render a true verdict." Commonwealth v. Johnson, 516 Pa. 527, 533, 533 A.2d 994, 997 (1987). "The prejudicial effect of the prosecutorial remarks must be evaluated in the context in which they occurred." Commonwealth v. Green, supra., 525 Pa. 424, 581 A.2d 544.

Commonwealth v. Lassen, 442 Pa. Super. 298, 659 A.2d 999 (1995).

> Furthermore, the court in Lassen stated:
>
> "[A] criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statement or conduct must be viewed in context; only by so doing can it be determined whether the prosecutor's conduct affected the fairness of the trial."

Id., 442 Pa. at 300, 659 A.2d at 1001.

This Court has reviewed the closing statement of the Commonwealth. The comments that the District Attorney made in regards to Lisa Maines and the Petitioner do not meet the test that was discussed previously. The record does not support the claim of Petitioner. Therefore, Petitioner is not entitled to relief on this claim.

Petitioner alleged that Trial Counsel, in the specific instances above, and generally, was insensitive to this case and failed to adequately prepare for trial or to perform during trial. This

Court has addressed the previous issues and will not reiterate them. In regards to the Petitioner's general contention that trial counsel was insensitive to this case and failed to adequately prepare for trial or to perform during trial, trial counsel has been a public defender in this county for more than a decade. This Court is not aware of a single instance when trial counsel has not been ready or prepared for trial. The record does not support the allegation of Petitioner. Therefore, Petitioner is not entitled to relief on this claim.

WHEREFORE, the Court enters the following:

ORDER

NOW, this 24th day of June, 1999, following hearing, argument and briefs into the Defendant's Petition under the Post Conviction Relief Act, it is the ORDER of this Court that said Petition be and is hereby dismissed.

BY THE COURT:

/s/ John K. Reilly, Jr.
John K. Reilly, Jr.
President Judge

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee	:	
v.	:	
EDWARD V. HUMMEL, Appellant.	:	No. 1169 WDA 1999

Appeal from the PCRA Order entered June 24, 1999 in the Court of Common Pleas of Clearfield County, Criminal Division, at No. 92-229-CRA.

BEFORE: LALLY-GREEN, TODD, and BROSKY, JJ.

MEMORANDUM:

Appellant, Edward Vincent Hummel, appeals from the order entered June 24, 1999, dismissing his first petition brought pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S.A. §§ 9541-46. We affirm.

The PCRA court found the following relevant facts:

1). On November 22, 1991, [Appellant] severely beat his wife at their residence. Immediately thereafter, [Appellant] shot and killed his wife.

2). Sometime shortly after notifying some of his family members that he had killed his wife, [Appellant] returned to his home and shot himself.

3). Charges of Criminal Homicide and Aggravated Assault were later filed by the Pennsylvania State Police against [Appellant] following his discharge from a series of hospitals and a rehabilitation center (Nittany Valley Rehabilitation Center).

4). [Appellant] was represented by the Office of the Public Defender of Clearfield County, more specifically, F. Cortez Bell, III, Esquire (hereinafter "Trial Counsel").

5). [Trial] Counsel testified that since 1979, he has practiced criminal law in pennsylvania and has been a constant member of the Public Defender's Office in Clearfield County for the last ten (10) years (TR-9).

6). The [t]estimony of Trial Counsel is found to be credible and persuasive for the following reasons:

a). Trial Counsel testified that prior to the Preliminary Hearing of [Appellant], Trial Counsel for [Appellant] filed five (5) separate petitions for continuances before the Court of Common Pleas in Clearfield County.

b). Trial Counsel had requested the continuances in order that appropriate psychological testing could be performed on [Appellant] in order to determine whether he was competent to stand trial.

c). Trial Counsel testified that on five (5) separate occasions, this Court granted [Appellant's] requests of continuances of the Preliminary Hearing.

d). Trial Counsel testified that during a six (6) month period between the filing of the original Petition for Continuance and the Preliminary Hearing (March 10, 1992 to August 12, 1992), [Appellant] was examined by two separate psychologists, Dr. Vincent F. Berger (Appellant) and Dr. Allen M. Tepper (Commonwealth).

[e)]. Both doctors, Dr. Berger (Appellant) and Dr. Tepper (Commonwealth), received and reviewed the medical records of [Appellant] and met with him personally for the purpose of a competency evaluation.

f). Both psychologists, Dr. Berger (Appellant) and Dr. Tepper (Commonwealth) concluded and agreed that [Appellant] was competent to stand trial, however, both psychologists outlined certain physical and mental restrictions for [Appellant] in their respective reports which would have to be taken into account for the purpose of conducting the jury trial.

g). On August 7, 1992, the Commonwealth filed the report of Dr. Tepper with this Court while on August 10, 1992, Trial [C]ounsel of [Appellant] filed the report of [its] psychologist, Dr. Berger.

h). On August 7, 1992, three (3) days before counsel for [Appellant] filed the report of [its]

psychologist, Trial [C]ounsel for [Appellant] filed a petition with this Court requesting the Court to determine his competency.

i). On August 10, 1992, following a review of the reports that had been filed by the Commonwealth and [Appellant], this Court issued an Order, upon the agreement of the parties, that based upon the findings of both psychologists, [Appellant] was competent to stand trial with certain physical and mental restrictions for trial purposes that this Court specifically noted in the Order.

j). During the Preliminary Hearing on August 12, 1992, Trial Counsel testified that he discussed with [Appellant], as he does with all his clients, the criminal charges filed against him, what were his legal options, and the procedures that would follow (TR-20).

k). Trial Counsel testified that he had a discussion with [Appellant] before the Preliminary Hearing about the suicide note that he had left concerning his wife's [I]nfidelity (TR-20).

l). Trial Counsel testified that he explained the charges, especially, the difference between homicide and voluntary manslaughter, the defense of provocation and other matters with [Appellant] (TR-20).

m). Trial Counsel testified that [Appellant] acknowledged what counsel was explaining to him at the Preliminary Hearing (TR-20).

n). During the Preliminary Hearing, Trial Counsel testified that [Appellant] aided in his defense by suggesting questions to counsel (TR-22).

o). [Trial] Counsel testified that [Appellant] was on bail and resided with his parents in Wallacetown, Pennsylvania (approximately 15 miles from Clearfield) between the preliminary hearing and [Appellant's] jury selection (TR-23, 24).

p). Trial Counsel testified that he had extensive contact with the parents of [Appellant] before [Appellant's] jury selection. (TR-24).

q). Trial Counsel testified that the parents/guardians of [Appellant] told him [Appellant] was not competent to speak to him, [Appellant] was "sliding backwards" and had no hope for recovery. (TR-24).

[r).] The parents/guardians provided Trial Counsel with information, financial statements, and a list of witnesses that would aid in the defense of their son at the time of trial. (TR-24).

s). Trial Counsel testified that he relied on the information that [Appellant's] parents/guardians had provided to him in regards to [Appellant's] condition and that he was prepared to re-visit the issue of competency with the court (TR-25).

t). Trial Counsel testified that [Appellant] attended jury selection.

u). Trial Counsel testified that during jury selection, [Appellant] consulted with counsel and aided him in the jury selection process (TR-25).

v). Based on his observations and conversations with [Appellant] during his jury selection, Trial Counsel testified that [Appellant] was competent, contrary to the reports that he received from [Appellant's] parents/guardians (TR-20).

w). [Trial] Counsel testified that when the situation called for it, he was prepared to "re-visit" the issue of [Appellant's] competency (TR-26).

x). Trial Counsel testified that he had sufficient information about [Appellant's] case from [Appellant's] parents/guardians, other sources and did not discuss the matter with [Appellant] (TR-28).

y). Trial Counsel testified that it was his strategy to refrained [sic] from discussing specifics of the murder with [Appellant] because if [Appellant] recalled anything, it would ruin the issue of incompetency that trial counsel was trying to set up for trial (TR-28, 29).

z). Trial Counsel testified and agreed with [Appellant's] counsel that under the law of Pennsylvania there is a procedure for determining competency (TR-30).

i). Trial Counsel testified that by his observations and conversations with [Appellant]

during jury selection and over the course of the trial, he did not feel that it was in his client's best interests if the judge were to question [Appellant] as to his competency (TR-30).

ii). Trial Counsel testified that he would verbally describe to [Appellant] what was happening in the courtroom due in pact [sic] to [Appellant] suffering from certain sight deficiencies (TR-37).

iii). Trial Counsel testified that despite [Appellant's] sight deficiencies, [Appellant] was acknowledging and responding to his counsel's questions and remarks at every stage of the proceedings (TR-37).

iv). Trial Counsel testified that during the testimony of pathologist [sic], he realized that [Appellant] may have know [sic] more about the circumstances surrounding the murder than he had let on to his counsel (TR-38).

v). Trial Counsel testified that as the District Attorney handed a ruler to the pathologist to measure the distance from the sight to the hammer of the gun used in the killing to explain to the jury how the marks may have been made on the face of the victim before she was killed. [Appellant] said to Trial Counsel, "They will never know what caused those injuries, but I can tell you it was not the gun." (TR-39).

vi). Trial Counsel testified that he objected and counsel approached the bench and the Court called a recess. During the recess Trial [C]ounsel

further questioned [Appellant] on his comments, however, [Appellant] just repeated the statement, but, would not say anything else to counsel (TR-39).

vii). Trial Counsel testified that he had no idea what was causing [Appellant's] lack of willingness to discuss the matter with him (TR-39).

viii). Trial Counsel did not think it was appropriate to discuss the matter with the court due to his trial strategy to have [Appellant's] competency become an issue during trial (TR-40).

ix). Trial Counsel testified that when it came time during the trial to decide whether or not to have [Appellant] testify, he discussed the matter with [Appellant] and his father, who was seated at the defense table with [Appellant] (TR-34).

x). Trial Counsel testified that he told [Appellant] that he did not have to testify and if he didn't testify that by declining to do so could not be held against him, however, if he chose to testify the more he recalled, the chance of any claims of incompetency that he wished to raise during the course of trial or on appeal would be hurt (TR-34).

xi). Trial Counsel testified that he, [Appellant], and [Appellant's] father made the decision that [Appellant] would not testify (TR-34).

xii). Trial Counsel testified that he believed that [Appellant] was competent to testify,

however, he was not sure that he was competent to testify in his own defense (TR-36-37).

xiii). During the Commonwealth's closing argument to the jury, [Appellant] burst out and said "Tell them about the blow jobs" [sic] (TR-40).

xiv). Trial Counsel testified that as soon as [Appellant] said the phrase as mentioned above, he and [Appellant's father], seated at the same table, attempted to covered [sic] [Appellant's] mouth with their hands (TR-40).

xv). Trial Counsel testified that [Appellant] was removed from the courtroom and continued to struggle to say the same phrase over again (TR-41)[.]

xvi). Trial Counsel testified that during a short recess, [Appellant] was not in physical condition to speak to him (TR-43).

xvii). Trial Counsel testified that the court inquired whether counsel wanted [Appellant] back into the courtroom for the remainder of closing argument of Commonwealth [sic] and the reading of jury instructions, but Trial Counsel stated that he did not want [Appellant] back into the courtroom because he didn't know what kind of control he would have over him (TR-43).

xviii). Trial Counsel testified that he preserved the issue of competency in Post Trial Motions and his [a]ppeal to the Superior Court (TR-51).

PCRA Court Opinion at 1 – 11.

On February 4, 1993, a jury convicted Appellant of murder of the first degree[1] and aggravated assault.[2] N.T., 02/04/93, at 84-85. Appellant's trial counsel filed a post-trial motion for a new trial based on Appellant's alleged incompetence to stand trial. Docket Entry 40. The trial court denied Appellant's motion and sentenced appellant to life imprisonment for the first degree murder conviction, and a concurrent sentence of five to ten years' imprisonment for the aggravated assault conviction. Docket Entry 41, N.T., 2/5/93, at 7 – 8. Appellant filed a direct appeal with this Court claiming that the trial court erred in finding Appellant competent to stand trial. Docket Entry 45. On November 19, 1993, we affirmed Appellant's judgment of sentence. ***Commonwealth v. Hummel***, No. 393 PITTSBURGH 1993, unpublished memorandum (Pa. Super., filed November 19, 1993). Appellant's parents subsequently filed a petition for allowance of appeal with our Supreme Court, which was denied on April 15, 1994. ***Commonwealth v. Hummel***, 644 A.2d 733 (Pa. 1994).

On December 26, 1995, Appellant filed a Petition to Vacate Judgment of Sentence Because of Defendant's Incompetence, or, in the alternative, for a New Trial pursuant to the Post Conviction Relief Act § 9541, *et. seq.* Docket Entry 88. Following an evidentiary hearing, the PCRA court dismissed Appellant's petition on June 24, 1999. Docket Entry 111. This time appeal followed. Docket Entry 112. We affirm.

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[1] 18 Pa.C.S. § 2502(a).

[2] 18 Pa.C.S. § 2702(a)(1) & (4).

Appellant presents the following issues for our review:

I. WAS COURT-APPOINTED COUNSEL INEFFECTIVE IN HIS REPRESENTATION OF APPELLANT ON THE ISSUE OF APPELLANT'S MENTAL INCOMPETENCY TO STAND TRIAL DUE TO BRAIN DAMAGE FROM A SELF-INFLICTED GUN SHOT WOUND TO HIS HEAD WHEN HE ATTEMPTED TO COMMIT SUICIDE?

II. DID THE TRIAL JUDGE CLEARLY ABUSE HIS FACT-FINDING DISCRETION WHEN HE REJECTED THE UNCONTRADICTED EXPERT TESTIMONY THAT APPELLANT WAS NOT COMPETENT TO STAND TRIAL?

III. WAS TRIAL COUNSEL INEFFECTIVE IN PREPARING FOR AND IN PRESENTING APPELLANT'S DEFENSE THAT HE WAS GUILTY OF NO MORE THAN VOLUNTARY MANSLAUGHTER?

IV. WAS DEFENSE COUNSEL INEFFECTIVE, AT TRIAL, FOR FAILING TO SEEK OFFERS OF PROOF, FAILING TO OBJECT TO TESTIMONY ABOUT REMOTE, PREJUDICIAL EVENTS AND FOR

FAILING TO EFFECTIVELY CROSS-EXAMINE?

V. WAS TRIAL COUNSEL INEFFECTIVE FOR PRESENTING CHARACTER WITNESSES AND IN REPRESENTING APPELLANT AS TO REBUTTAL WITNESSES PRESENTED BY THE COMMONWEALTH?

VI. DID APPELLANT WAIVE HIS CONSTITUTIONAL RIGHT TO BE PRESENT DURING THE CONCLUSION OF THE DISTRICT ATTORNEY'S CLOSING ARGUMENT DURING THE COURT'S CHARGE TO THE JURY?

VII. WAS DEFENSE COUNSEL INEFFECTIVE FOR FAILING TO OBJECT TO AND MOVE FOR A MIS-TRIAL BECAUSE OF THE COMMONWEALTH'S IMPROPER CLOSING ARGUMENT WHEREIN IT COMPARED APPELLANT'S VIOLENT RESPONSE TO PROVOCATION WITH THE NON-VIOLENT RESPONSE OF ANOTHER WITNESS IN THE CASE?

VIII. DID THE TRIAL JUDGE RENDER AN UNFAIR AND PARTIAL REVIEW OF THE FACTS AND THE LAW APPLICABLE TO THIS CASE?

Appellant's Brief at 3. When reviewing an order denying PCRA relief, we must determine whether the PCRA court's determination is supported by the record and is free from legal error. ***Commonwealth v. Allen***, 732 A.2d 582, 586 (Pa. 1999). It is for the PCRA court to resolve credibility issues and make specific findings of fact. ***Commonwealth v. Basemore***, 744 A.2d 717, 735-36 (Pa. 2000). Moreover, we are mindful that '[o]n appeal, [we] will not disturb the factual findings of the P.C.R.A. court when those findings are supported by the record." ***Commonwealth v. Lewis***, 634 A.2d 633, 635 (Pa. Super. 1993), *appeal denied*, 653 A.2d 1228 (Pa. 1994).

Appellant first claims court-appointed counsel was ineffective respecting Appellant's alleged incompetence to stand trial due to brain damage sustained from a self-inflicted gun shot wound. Appellant essentially argues that counsel failed to follow the Mental Health Procedures Act, 50 P.S. § 7101 *et seq.*, ("Act"). He also claims that counsel was ineffective in failing to secure the appointment of a psychiatrist and to request a hearing before the trial court.

Our standard of review for evaluating an ineffective assistance of counsel claim is as follows:

> We presume that trial counsel is effective and place on the defendant the burden of proving otherwise. We are required to determine whether the issue underlying the claim is of arguable merit. If the claim is without merit, our inquiry ends because counsel will not be

> deemed ineffective for failing to pursue an issue which is without basis. Even if the underlying claim has merit, the appellant still must establish that the course of action chosen by his counsel had no reasonable basis designed to effectuate the client's interests and, finally, that the ineffectiveness prejudiced his right to a fair trial.

Commonwealth v. Dean, 693 A.2d 1360, 1366 (Pa. Super. 1997) (citations omitted). "[W]here . . . a petitioner fails to prove prejudice, a claim of ineffective assistance of counsel may be rejected upon that basis alone." ***Commonwealth v. Williams***, 732 A.2d 1167, 1179 (Pa. 1999) (citations omitted).

We first set out the relevant portions of the Act:

> (c) Application for Incompetency Examination. – Application to the court for an order directing an incompetency examination **may be** presented by an attorney for the Commonwealth, a person charged with a crime, his counsel, or the warden or other official in charge of the institution or place in which he is detained. A person charged with crime shall be represented either by counsel of his selection or by court-appointed counsel.
>
> (d) Hearing; When Required.—The court, either on application or on its own motion, **may** order an incompetency examination at any stage in the proceedings and **may** do so without a hearing unless the examination

is objected to by the person charged with a crime or by his counsel. In such event, an examination shall be ordered only after determination upon a hearing that there is a prima facie question of incompetency.[3]

(e) Conduct of Examination; Report. – When ordered by the court, an incompetency examination shall take place under the following conditions:

(1) It shall be conducted as an outpatient examination unless an inpatient examination is, or has been, authorized under another provision of this act.

(2) It shall be conducted by at least one psychiatrist and may relate both to competency to proceed and to criminal responsibility for the crime charged.

(3) The person shall be entitled to have counsel present with him and shall not be required to answer any questions or

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[3] We observe that Appellant was tried before subsection (d) was amended in 1996 by the addition of the following sentence:

> "Upon completion of the examination, a determination of incompetency shall be made by the court where incompetency is established by a preponderance of the evidence." 50 P.S. § 7402(d), as amended 1996.

Prior to the 1996 amendment, defendant had the burden of proving incompetence by clear and convincing evidence. ***See, e.g., Commonwealth v. Banks***, 521 A.2d 1 (Pa. 1987), *cert. denied* 108 S.Ct. 211, 484 U.S. 873, 98 L.Ed.2d 162, *denial of post-conviction relief affirmed* 656 A.2d 467 (Pa. 1995), *cert. denied* 116 S.Ct. 113, 516 U.S. 835, 133 L.Ed.2d 65.

to perform tests unless he has moved for or agreed to the examination. Nothing said or done by such person during the examination may be used as evidence against him in any criminal proceedings on any issue other than that of his mental condition.

(4) A report shall be submitted to the court and to counsel and shall contain a description of the examination, which shall include:

(i) diagnosis of the person's mental condition;

(ii) an opinion as to his capacity to understand the nature and object of the criminal proceedings against him and to assist in his defense;

(iii) when so requested, an opinion as to his mental condition in relation to the standards for criminal responsibility as then provided by law if it appears that the facts concerning his mental condition may also be relevant to the question of legal responsibility; and

(iv) when so requested, an opinion as to whether he had the capacity to have a particular state of mind, where such state of mind is a required element of the criminal

charge.

50 P.S. §§ 7402(c), (d) and (e). (emphasis added).

As the above reflects, both Sections 7402(c) and (d) use the term "may." Section 7402(c) provides that an attorney ***may*** apply for an incompetency examination. Section 7402(d) provides that the court ***may*** order an incompetency examination at any stage in the proceedings and ***may*** do so without a hearing.[1] Section 7402(e), however, sets out mandatory rules concerning the conduct of the mental health examination ***after*** the court has exercised its discretion in directing a defendant to undergo a mental health examination.

We interpret "may" in accordance with its plain and common usage. "It is well settled that when the language of a statute is clear and unambiguous, the statute must be interpreted in accordance with its plain and common usage." ***Commonwealth v. Burnsworth***, 669 A.2d 883, 886 (Pa. 1995). The word "may" allows for discretion; the word "shall" means mandatory. ***See, Oberneder v. Link Computer Corp.***, 696 A.2d 148, 150 (Pa. 1997) ("By definition, 'shall' is mandatory.") Thus, both subsections (c) and (d) permit the exercise of discretion.

We next examine the standards for determining a

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[1] The exception to this rule is when the accused or his counsel objects to the examination. In that case, the court ***shall*** order an examination only after the court determines upon a hearing that a prima facie question of incompetency exists. The record reflects that no examination was ordered. Thus, neither Appellant nor his counsel triggered the other provisions of subsection (d).

defendant's competency to stand trial.

> The decision as to a defendant's competency to stand trial rests within the discretion of the trial judge. In deciding the question of competency, however, the judge should enter upon a careful and complete inquiry, and his decision should be an informed one, based on evidence. Where the decision is not based on proper or sufficient evidence we will order the case remanded so that the judge may make an informed decision.

Commonwealth v. Knight, 419 A.2d 492, 497 (Pa. Super. 1980) (citations and quotations omitted). The test for competency to stand trial is as follows:

> [T]he test to be applied in determining the legal sufficiency of [a defendant's] mental capacity to stand trial, or enter a plea at the time involved, is not the M'Naghten 'right or wrong' test but rather his ability to comprehend his position as one accused of murder and to cooperate with his counsel, in making a rational defense. Or stated another way, did he have sufficient ability at the pertinent time to consult with his lawyers with a reasonable degree of rational understanding, and have a rational as well as factual understanding of the proceedings against him.

Commonwealth v. Kennedy, 305 A.2d 890, 892 (Pa. 1973).

Our review of the record reflects that on August 7, 1992, trial counsel filed a petition requesting the

trial court to determine Appellant's competency to stand trial. PCRA Court Finding of Fact 6(h); Docket Entry 20. (This petition, thus, was filed prior to Appellant's preliminary hearing held August 12, 1992. *Id.* at 6(j)). The record also reflects the trial court did not order a competency examination. Thus, the mandatory procedures for conducting a mental health examination under § 7402(e) were not triggered.

The record does contain an Order dated August 10, 1992 which states in part:

> . . . [T]he Court having received and reviewed the reports of Dr. Allen M. Tepper and Vincent F. Berger, the Commonwealth's and Defendant's Experts who performed separate psyhcological [sic] evaluations, and upon the agreement of the Commonwealth and the Office of the Public Defender representing the Defendant, it is the ORDER of this Court that the Defendant is found to be competent to stand trial. . . .

Order, August 10, 1992; Docket Entry 22. Thus, the record reflects that the trial court considered psychological reports from the defense and prosecution. *Id.* Then, with the consent of both counsel, the trial court entered an order holding Appellant was competent to stand trial with certain physical and mental restrictions. *Id.*

Appellant presently claims, *inter alia*, that trial counsel was ineffective for failing to follow section 7402(e) of the Act. Section 7402(c) does not mandate counsel to file a petition; it is within his or her

discretion to do so. Also, Section 7402(d) does not mandate the trial court to order an incompetency examination; it is within his or her discretion to do so. The mandatory provision of Section 7402(e) are triggered ***after*** a competency examination under Section 7402(d) has been ordered. Thus, since the provisions of the Act had not triggered, Appellant's claim that trial counsel was ineffective for failing to follow the Act lacks merit.

We also observe that Appellant has failed to demonstrate that counsel's actions caused him prejudice. Appellant failed to show that had counsel requested a competency examination under the Act, the trial court would have exercised its discretion and ordered the examination. Appellant also failed to show the examination would have established Appellant was incompetent to stand trial. Appellant in addition failed to show that this evidence, together with any other evidence offered by Appellant, would have been clear and convincing on the issue of competence. Thus, Appellant fails to demonstrate that counsel was ineffective with respect to the issue of his competency to stand trial.[5]

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[5] Our learned colleague dissents and argues that trial counsel was ineffective for failing to follow the procedures under the Act. He would conclude that trial counsel "failed to properly request an evidentiary hearing by the court to determine Appellant's competence, as is required by 50 Pa.C.S [sic] § 7402(e) specifically the services of a psychiatrist." Dissent at p. 7. As we concluded above, counsel was not required to request an evidentiary hearing under Section 7402(e) or to seek psychiatric services thereunder. Thus, counsel can not be deemed ineffective for failing to do so.

Appellant argues in his second issue that the trial court erred when it concluded that Appellant was competent to stand trial and rejected Appellant's contrary evidence. It is well-settled that before this Court can review an appellant's claim for post-conviction relief:

> Appellant is required by 42 Pa.C.S[.A] § 9543 to demonstrate eligibility for relief under the PCRA. Section 9543(a) mandates that appellant's allegation of error has not been previously litigated and that other conditions have been met. According to 42 Pa.C.S.[A.] § 9544(a)(2), an issue has been previously litigated when 'the highest appellate court in which the petitioner could have had review as a matter of right has ruled on the merits of the issue . . .

Commonwealth v. Michael, 755 A.2d 1274, 1277 (Pa. 2000) *citing* ***Commonwealth v. Peterkin***, 538 Pa. 455, 460-61, 649 A.2d 121, 123 (1994), *cert. denied*, 515 U.S. 1137, 115 S.Ct. 2569, 132 L.Ed.2d 821 (1995) (citations omitted). ***See also***, 42 Pa.C.S.A. § 9543(a) and § 9544(a)(2).

Our review of the record reflects that the issue of Appellant's competency to stand trial has been previously litigated on direct appeal to this Court. ***See, Commonwealth v. Hummel***, 639 A.2d 839 (Pa. Super. 1993), *appeal denied*, 644 A.2d 733 (Pa. 1994) (unpublished memorandum). On direct appeal, Appellant argued that the trial court erred in ruling that Appellant was competent to stand trial. We rejected Appellant's argument, affirmed his

judgment of sentence and stated: "the trial court did not err in its determination that [A]ppellant was competent to stand trial." *Id.* at slip op. 4. Appellant now asks us to revisit the trial court's competency determination. Appellant is not entitled to PCRA relief on his second issue as this issue was previously litigated. ***Michael***.

Appellant's third claim is that counsel was ineffective: (i) in failing to properly pursue a voluntary manslaughter defense; and (ii) in failing to request individual *voir dire* of prospective jurors.[6] With respect to his claim that trial counsel was ineffective for failing to properly pursue a voluntary manslaughter defense, Appellant essentially alleges trial counsel misunderstood the defense and erroneously argued to the jury that "mere words" did not amount to legal provocation. Appellant's Brief at 56. As a result, Appellant claims that trial counsel turned the trial into a "slow plea of guilty." *Id.*

The Pennsylvania Crimes Code defines voluntary manslaughter as follows:

> A person who kills an individual without lawful justification commits voluntary manslaughter if at the time of the killing he is acting under a sudden and intense passion resulting from serious provocation. . . .

18 Pa.C.S.A. § 2503(a); ***Commonwealth v. Carr***, 580

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[6] We note that within Appellant's issue numbered III, Appellant again raises issues concerning his competency to stand trial. We have addressed this issue in issue two and determined that the issue of trial court error respecting competency was previously litigated.

A.2d 1362, 1364 (Pa. Super. 1990). This Court has said:

> The passion that will reduce an unlawful killing to voluntary manslaughter must be caused by legally adequate provocation. The test for determining the existence of legally adequate provocation is an objective test.
>
> . . .
>
> In making the objective determination as to what constitutes sufficient provocation reliance may be placed upon the cumulative impact of a series of related events. The ultimate test for adequate provocation remains whether a reasonable man, confronted with this series of events, became impassioned to the extent that his mind was 'incapable of cool reflection.'
>
> If sufficient provocation exists, the fact finder must also determine whether the defendant actually acted in the heat of passion when he committed the homicide and thus whether the provocation led directly to the killing or whether there was sufficient 'cooling' period so that a reasonable man would have regained his capacity to reflect.

Carr, 580 A.2d at 1364 (citations omitted).

Also, a trial court correctly charges a jury on voluntary manslaughter when it states that "no words nor mere gestures, however false, foul or insulting will free a party from the guilt of murder . . . " and that "[i]nsulting or scandalous words are not sufficient cause of provocation" to reduce murder to

involuntary manslaughter. *Commonwealth v. Outlen*, 290 A.2d 253, 255 (Pa. 1972).

Our review of the record reveals trial counsel argued the following to the jury with respect to a voluntary manslaughter defense:

> On the defense side, ladies and gentlemen, I want you to look at the bottom on there. Voluntary manslaughter. You'll see that we have on the sheet here that it says no malice. Voluntary manslaughter is sill an intentional killing. I can intend to kill you. But there's no malice behind that. Now, why? Same circumstances can apply, but there's no malice. You have no malice, because for some reason something had gotten me so steamed up, so mad, so angry, so terrorized, so whatever you want to call it, that my mind is not thinking right and I can't form the premeditation and deliberation, and I can't form what's needed for malice. Okay. It's the same thing as first degree murder, but because of the circumstances, I can't have these two items here. And the law will tell you, and Judge Reilly will state, that it can be a combination of things that lead me into that mental state. It does not have to be just one thing. It can be a whole combination.
>
> Now, the law also says that mere words aren't enough. If I say something to you and it gets you upset, just the fact that I've said that is not enough to give you the intense passion, the provocation. But you can add

things together over a course or series of time.

N.T., 3/4/93, at 6 – 7.

Appellant claims trial counsel misunderstood voluntary manslaughter and erroneously stated that "mere words aren't enough" for a conviction. The record reflects that the reverse is true because trial counsel accurately stated the law. This claim lacks merit.

Also in his third issue Appellant claims trial counsel was ineffective for failing to conduct individual *voir dire* because of erroneous pre-trial publicity that Appellant killed his wife for insurance proceeds. Appellant's Brief at 57. We must first determine whether this issue has been waived.

> It is Appellant's responsibility to supply this Court with a complete record for purposes of appeal, Pa.R.A.P.1911, and we may not consider any information which is not contained in the certified record. ***Smith v. Smith***, [ ], 637 A.2d 622, 624 (Pa.Super.1994) ("[A] failure by an appellant to insure that the original record certified for appeal contains sufficient information to conduct a proper review constitutes a waiver of the issue sought to be examined."); ***Commonwealth v. Quinlan***, 488 Pa. 255, 412 A.2d 494 (1980); ***Commonwealth v. Buehl***, [ ], 588 A.2d 522 (Pa.Super.1991).

Commonwealth v. Hallock, 722 A.2d 180, 182 (Pa. Super. 1998). For purposes of appellate review,

what is not of record does not exist. ***Commonwealth v. Montalvo***, 641 A.2d 1176, 1183 (Pa. Super. 1994).

> '[I]n non-capital cases non-capital cases the trial court is vested with discretion in the method by which the voir dire examination shall be conducted. Absent an abuse of such discretion, a reviewing court cannot disturb the trial court's actions.' ***Commonwealth v. Berrigan,*** 509 Pa. 118, 135, 501 A.2d 226, 235 (1985). Even in cases with pre-trial publicity 'only a palpable error resulting in abuse of discretion justifies reversal' of a denial of individual voir dire. *Id.* at 137, 501 A.2d at 236; ***see also Commonwealth v. Boring,*** 453 Pa. Super. 600, 611-12, 684 A.2d 561, 566 (1996).

Commonwealth v. Rovinski, 704 A.2d 1068, 1073 (Pa. Super. 1997).

Here, Appellant claims pretrial publicity that he killed his wife for insurance proceeds was erroneous, and, therefore, trial counsel was ineffective for failing to conduct individual *voir dire*. This claim is waived because no where does the record reflect that pretrial publicity concerning Appellant's motive for the murder was an issue in this case.

Further, we note that, during *voir dire*, Appellant's trial counsel asked the venire if media coverage would adversely effect partiality. N.T., 1/4/93, at 27 – 28. Trial counsel received a negative response. *Id.* at 28. Accordingly, had this issue not been waived, it would have been dismissed for lack of merit.

Appellant next claims trial counsel was ineffective for failing to seek offers of proof, for failing to object to evidence about remote, prejudicial events, and for failing to effectively cross-examine certain witnesses. The substance of Appellant's claims probes whether witnesses are competent and evidence is relevant.

Generally, every person is competent to be a witness, except as otherwise provided by statute. 42 Pa.C.S.A. §§ 5911 & 5921. Evidence is relevant when it "tends to make a fact at issue more or less probable . . . " ***Commonwealth v. Foy***, 612 A.2d 1349, 1351 (Pa. 1992) (citations omitted). Once a trial court finds evidence to be relevant, the evidence will be inadmissible only if its probative value is substantially outweighed by the danger of unfair prejudice or confusion. ***See, id.***

> [E]vidence concerning the previous marital relationship between a defendant and a homicide victim may be relevant and admissible to prove ill will, motive, or malice, and . . . such evidence can include instances in which the defendant threatened, quarreled with, or physically abused the victim. . . . Testimony concerning the marital relationship between a defendant and decedent, like any other evidence, *is subject to the general evidentiary rules governing competency and relevancy*.

Commonwealth v. Myers, 609 A.2d 162, 164-165 (Pa. 1992) (citations and quotations omitted) (emphasis in original). Finally, our review is limited:

> We are wholly unable to review [an] appellant's claim absent a proper argument containing references to specific locations in the record substantiating the averments. We decline to become substitute counsel for appellant in [these] matters and deem [such] issue[s] waived.

Commonwealth v. Rodgers, 605 A.2d 1228, 1239 (Pa. Super. 1992), *appeal denied*, 615 A.2d 1311 (Pa. 1992); ***see also***, Pa.R.A.P. 2119(a).

Here, Appellant claims trial counsel was ineffective for failing to seek offers of proof and/or for failing to object during the testimony of Leonard Martin, Larry Putt, Ellsworth Coble, Janelle Hummel, Lena Hummel, and Thomas Dixon. These witnesses testified, *inter alia*, as to their first-hand knowledge of incidents during which Appellant threatened to kill his wife and/or incidents during which Appellant physically abused his wife. Each witness was competent to testify and Appellant does not challenge competence. The testimony of each witness was also relevant for the purpose of demonstrating Appellant's ill will and malice toward the victim and for the purpose of showing Appellant's motive for the murder.

The issue, therefore, is whether the prejudicial value of the evidence far outweighed its probative value. In his brief, Appellant offers no argument as to why he believes the prejudicial value of this evidence far outweighed its probative value. Instead, Appellant baldly asserts that had trial "counsel sought offers of proof, there would have

been no need to cross-examine these witnesses, because ***in all probability*** the trial judge would have concluded that the events and words were transitory and that their prejudicial value far outweighed any probative value." Appellant's Brief at 60 (emphasis added). Because Appellant's arguments fails to include a pertinent discussion of the particular point raised and fails to include citation to pertinent authorities, this issue is waived.

Appellant next claims trial counsel was ineffective for calling character witnesses, which opened the door to adverse rebuttal witnesses. Appellant further claims trial counsel was ineffective for failing to investigate and effectively cross examine the rebuttal witnesses.

Appellant fails to provide, and we cannot locate, any case law supporting an ineffectiveness claim for actually calling character witnesses. Appellant also fails to provide references to the record to support his assertion that Appellant suffered prejudice as a result of trial counsel calling character witness, Ray Walker, who testified Appellant was "a good citizen," "honorable," and peaceful and law abiding. N.T., 2/3/93, at 112.

Our review of the record reflects that, on rebuttal, the Commonwealth called four witnesses. David Smeal testified Appellant's reputation for being peaceful and nonviolent was "poor." *Id.* at 116. On cross-examination, Mr. Smeal testified Appellant was law-abiding "most of the time." *Id.* at 118. Linda Bowes and Odette Pelton testified Appellant's reputation for being peaceful and nonviolent was

"very poor." *Id.* at 120, 124. Thomas Dixon testified he had never heard any people discussing Appellant's reputation for being peaceful and law-abiding. *Id.* at 128. Mr. Dixon further testified he witnessed an incident in 1989 in which Appellant and the victim were fighting. *Id.* at 129. On cross-examination, Mr. Dixon testified he did not see Appellant strike the victim, nor did he see any evidence Appellant struck the victim. *Id.* at 131.

Appellant fails to demonstrate how this evidence, though harmful perhaps in his case, prejudiced his right to a fair trial. Because Appellant has failed to meet the prejudice prong of his ineffectiveness claim, we dismiss it on that basis alone.[7]

Appellant next claims that his constitutional rights were violated when he was removed from the courtroom during the prosecution's closing argument because he did not waive his right to be present during the balance of the Commonwealth's closing and the trial court's chare. A defendant has a constitutional right to be present in court at every stage of a criminal trial. ***See, generally, Commonwealth v. Abu-Jamal***, 720 A.2d 79, 109 (Pa. 1998), *cert. denied*, ***Abu-Jamal v. Pennsylvania***, 120 S.Ct. 41, 528 U.S. 810, 145 L.Ed. 38 (1999). However, "removing a disruptive defendant from the proceedings is a permissible means for a court to discharge its duty to defend the judicial process."

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[7] We note that Appellant also claims that trial counsel was ineffective for failing to properly cross-examine these witnesses. Appellant advances no argument or record support for this bald assertion. Appellant, therefore, waives this claim.

Id., citing ***Commonwealth v. Africa***, 353 A.2d 855, 863 (Pa. 1976).

Our review of the record reflects Appellant was removed from the courtroom after uttering inaudible words and making noises in a disturbing and distracting manner during the Commonwealth's closing argument. N.T., 2/4/93, at 40-41. Appellant concedes, and the PCRA Evidentiary Hearing Transcript reflects, Appellant was removed from the courtroom following an outburst concerning oral sex. Appellant's Brief at 62; N.T., 9/8/97, at 41-42. Under these circumstances, the removal of Appellant from the proceedings was proper. The claim lacks merit.

Appellant next claims trial counsel was ineffective for failing to object during the Commonwealth's closing argument when the Commonwealth compared Appellant's violent reaction after hearing that his wife was having an affair with Walter Maines to the passive reaction of Mr. Maines' wife after hearing the same news. Appellant's Brief at 62-63.

> Comments by the prosecutor do not constitute reversible error unless the 'unavoidable effect of such comments would be to prejudice the jury, forming in their minds fixed bias and hostility towards the defendant so that they could not weigh evidence objectively and render a true verdict.'

Commonwealth v. Hernandez, 590 A.2d 325, 331 (Pa. Super. 1991) (citation omitted).

Appellant takes issue with eleven (11) words within the context of a portion of the Commonwealth's closing. The words are highlighted in the context in which they were spoken as follows:

> Lisa Maines was pregnant on November 22nd of 1991. She found out that day when she got that note out of the garbage can out on the porch that her husband was having an affair. She had suspected prior to this that her husband had been having an affair, so she was worried about it for a period of time. ***Did she get out a gun and kill her husband? No.*** Now, you can look at this to determine how does a reasonable person react? Maybe they would have separated. Maybe they would have gotten a divorce. Maybe they would have had to sell some of their things. This happens in life. It happens. But how does a reasonable person react? Do they severely beat their wife, call their mother and tell their parents to come down, and then get a gun and shoot her in the head? This isn't a voluntary manslaughter case. There's malice all over the place.

N.T., 2/4/93, at 48-49 (emphasis added).

Appellant fails to advance any argument or to cite any pertinent authority for his claim that this comment had the unavoidable effect of prejudicing the jury so as to form in their minds fixed bias and hostility towards Appellant so that they could not weigh the evidence objectively and render a true

verdict. Because Appellant has failed to demonstrate prejudice, this issue is waived.

Appellant finally claims the trial judge did not render a fair and impartial review of the case. Appellant again argues trial court error respecting its determination that Appellant was competent to stand trial. Again, this issue has been previously litigated on direct appeal. Thus, this issue has no merit. ***See, Michael.***

Order affirmed.

Judgment Entered:

/s/ Eleanor R. Valecko
Deputy Prothonotary

Date: September 28, 2001

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee	:	
v.	:	
EDWARD V. HUMMEL, Appellant.	:	No. 1169 WDA 1999

Appeal from the PCRA Order entered June 24, 1999 in the Court of Common Pleas of Clearfield County, Criminal Division, at No. 92-229-CRA.

BEFORE: LALLY-GREEN, TODD, and BROSKY, JJ.

CONCURRING AND DISSENTING MEMORANDUM BY BROSKY, J.:

I must respectfully dissent from the conclusion of the majority that affirmed the order dismissing Appellant's first petition brought pursuant to the Post Conviction Relief Act (PCRA). I believe that Appellant has established that trial counsel ineffectively represented him, and due to this ineffective representation, Appellant was not afforded his basis right to a fair trial.

Appellant's PCRA petition raises eight (8) separate issues for review. While I join in the majority's well-reasoned disposition of seven (7) of

the issues raised in this appeal, after a careful review of the record and the supporting law, I respectfully disagree with the majority's conclusion regarding the first issue Appellant raises on appeal. I base my dissent on the majority's disposition of the following issue:

> I. WAS COURT-APPOINTED COUNSEL INEFFECTIVE IN HIS REPRESENTATION OF APPELLANT ON THE ISSUE OF APPELLANT'S MENTAL INCOMPETENCY TO STAND TRIAL DUE TO BRAIN DAMAGE FROM A SELF-INFLICTED GUN SHOT WOUND TO HIS HEAD WHEN HE ATTEMPTED TO COMMIT SUICIDE?

I believe the majority correctly disposed of issues II and VIII as to competency, because they again ask us to consider whether the trial court erred in finding Appellant competent (based upon the limited evidence in the trial record).[1] However, I am convinced that the majority's disposal of issue number I, which concerns trial counsel's ineffectiveness in representing Appellant as to the competency determination, is flawed. I believe that trial counsel was ineffective in his representation of Appellant due to his failure to comply with certain rules governing competency hearings. And, due to his ineffectiveness, Appellant was clearly deprived of his right to a fair trial. ***See generally,***

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[1] These issues were disposed of during the direct appeal proceedings discussed above.

Commonwealth v. Mayer, 685 A.2d 571 (Pa. Super. 1996).

I agree with the majority's statement that our standard of review from the granting or denial of post conviction relief is limited to determining whether the trial court's determination is supported by the evidence of record and whether it is free of legal error. ***Commonwealth v. Travalgia***, 662 A.2d 352, 356 (1995), *cert. denied*, 516 U.S. 1121 (1996); ***See also, Commonwealth v. Allen***, 732 A.2d 582, 586 (Pa. 1999).

In order to be eligible for relief under a PCRA petition, an Appellant must plead and prove by a preponderance of the evidence that his conviction or sentence arose from one or more of the errors listed at 42 Pa.C.S. § 9543(a)(2). According to 42 Pa.C.S. § 9543(a)(2)(ii), in this case, Appellant must prove that counsel was ineffective, such that the truth-determining process was undermined to the point that no reliable adjudication of guilt or innocence could have taken place.

The Appellant has the burden of establishing a claim of counsel's ineffectiveness, as counsel is presumed effective. ***Commonwealth v. Balodis***, 747 A.2d 341, 343 (Pa. 2000) (citing ***Commonwealth v. McNeil***, 487 A.2d 802 (Pa. 1985)). In reviewing an ineffective assistance of counsel claim the threshold inquiry is whether the issue/argument/tactic which counsel has foregone and which forms the basis for the assertion of ineffectiveness is of arguable merit. *Balodis*, 747 A.2d at 343. If this threshold inquiry is met, the court must then consider whether counsel

had any "reasonable basis" for his chosen course. *Id.* (citing ***Commonwealth v. Peirce***, 527 A.2d 973 (Pa. 1987)). If the court finds he did not have any "reasonable basis" for his chosen course, then the Appellant (defendant) must demonstrate by a preponderance of the evidence that counsel's ineffectiveness worked to his prejudice. *Id.* Prejudice is established when Appellant shows that counsel's chosen course of action had an adverse effect on the outcome of the proceedings. ***Balodis***, 747 A.2d at 344 (citing ***Commonwealth v. Davis***, 541 A.2d 315 (Pa. 1988).

First, I will examine the threshold question of whether the issues/arguments and tactics Attorney Bell chose to forego were of arguable merit. ***Balodis***, 747 A.2d at 343. Appellant has met his burden of proving that his claim has arguable merit in the following particulars. It is clear even from a reading of the facts set forth by the majority, that Attorney Bell should have made inquiry as to Appellant's competence long before the filing of the direct appeal. The proper procedure to do so would have been to follow the Mental Health Procedures Act of 1976, 50 P.S. § 7101 and 7402, which states that he should have sought the appointment of and an examination by a **psychiatrist** for Appellant's benefit. This step was clearly required because of the self-inflicted wound to Appellant's brain (which has resulted in severe brain damage, including a short-term memory deficit) which has been well documented by both psychologists who examined Appellant, Appellant's parents, and others.

Instead, Attorney Bell and the District Attorney had Appellant examined by two psychologists, both of whom raised serious concerns about Appellant's competence to stand trial. [2] Thus, he did not adhere to the law by employing a psychologist (rather than a psychiatrist as stated in the statute) to determine his client's competency. And, he did not follow the instructions and recommendations[3] provided by the psychologist he retained, who specifically voiced his concerns about the defendant's ability to participate in his own defense, as he stated:

> In general, Mr. Hummel appears to be marginally competent to stand trial. The word marginally is used since there are two major areas of deficiency; both of these are in his ability to **meaningfully assist his counsel in his defense.** While Mr. Hummel is currently capable of thinking rationally . . . this ability appears to wax and wane, as does his ability to attend to what is going on around him . . . The difficulty regarding his ability to carry on rational thought processes and to attend to what is going on is a serious matter . . . In order for Mr. Hummel . . . to meaningfully participate with his attorney in

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[2] Competency to stand trial is not to be confused with the defense of insanity. Competency to stand trial relates to the time of the trial or other legal proceedings, while sanity concerns the mental state at the time of the commission of the offense. *Commonwealth v. Appel*, 689 A.2d 891 (Pa. Super. 1997).

[3] Also, he failed to make a record of his adherence to both psychologists' recommendations of frequent breaks and constant redirection.

> his defense, I believe his attorney will have to frequently get Mr. Hummel's attention and draw him back to what is happening in the courtroom . . . it may be necessary to have frequent court breaks . . . if testimony were to go on for more than five to ten minutes at a time without drawing Mr. Hummel back into the proceedings . . . **his ability to follow the proceedings would be severely limited.**

R.R. at 20a. (emphasis added).

Both psychologists provided equivocal opinions as to Appellant's competence. Yet, in the face of these opinions, Attorney Bell failed to properly request an evidentiary hearing by the court to determine Appellant's competence, as is required by 50 Pa.C.S. § 7402(c), namely the services of a psychiatrist. Although the majority points out that on August 7, 1992, Attorney Bell did petition the court to review the "expert reports" and determine whether a hearing was necessary, he did not formally request a hearing or an examination of his client by a psychiatrist, as prescribed by the statute. Furthermore, any attempt he had made on August 7, 1992 was effectively nullified because on August 10, 1992, he stipulated to Appellant's competence. In fact, in the August 10, 1992 order, the trial judge clearly stated that "upon the agreement of the Commonwealth and the Office of the Public Defender representing Defendant, it is the ORDER of this Court that the Defendant is found to be competent to stand trial." Trial Court Order – Competence, 8/10/92, #22. Even more disturbing is the fact that he stipulated to Appellant's

competence, without consulting with or alerting Appellant (or Appellant's parents, who were declared legal guardians) of this stipulation. Furthermore, he did not follow the advice of the Appellant's parents, who had stated repeatedly that Appellant was incompetent, and had even suggested that a psychiatrist examine Appellant.[4]

All of the above-mentioned actions and inactions are in direct conflict with the procedures set forth in the Mental Health Procedures Act. 50 Pa.C.S. § 7402.

The majority opines that the Mental Health Procedures Act is discretionary and quotes 50 Pa.C.S. § 7402(c) and (d) in support of their position. The operative language that the majority cites is that "an application to the court for an order directing an incompetency examination **may be** presented by an attorney for the Commonwealth, a person charged with a crime, his counsel, or the warden or other office in charge of the institution or place in which he is detained." This section should not be construed to mean that a defendant's attorney has the discretion to decide whether he or she should present an order directing an incompetence examination, but rather, this section simply sets forth the individuals who would be permitted to raise the issue. I believe that under the circumstances, as the Appellant's attorney, Mr. Bell should have at least requested the court to order

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[4] On May 2, 1992, months prior to this stipulation, Appellant's parents even provided trial counsel with a list of recommended psychiatrists, which did not include the psychologist ultimately retained by Attorney Bell.

that Appellant undergo a competence determination by a psychiatrist. I also believe he should not have stipulated without actually requesting an examination, and a hearing.

The majority has cited ***Commonwealth v. Knight***, 419 A.2d 492, 497 (Pa. Super. 1980), in support of its position that a judge has the discretion to determine whether a defendant is competent to stand trial. I agree wholeheartedly with this belief. However, as we further stated in ***Knight, supra***, "[i]n deciding the question of competency, however, the judge should enter upon a careful and complete inquiry, and his decision should be an informed one, **based on evidence**." ***Id.*** While the judge has discretion, that does not excuse a defendant's attorney for failing to request a competence examination. And, just because a judge has discretion in declaring competence, that does not mean that an attorney should stipulate without ever formally petitioning the court for an examination and a hearing under circumstances such as these. I disagree with the majority's analysis of the Mental Health Procedures Act as a discretionary statute. To the contrary, our Courts have continuously held that the "Mental Health Procedures Act is to be **construed strictly**." ***Commonwealth v. Blaker***, 446 A.2d 976 (Pa. Super. 1981). (emphasis added). ***See also Hahnemann University Hosp. v. Edgar***, 74 F.3d 456 (3rd Cir. 1996).

Once we have determined that the tactic/issue/argument trial counsel has foregone has arguable merit, the next question is whether Attorney Bell had any "reasonable basis" for his chosen course.

Balodis, 747 A.2d at 343. (citing ***Pierce***, 527 A.2d 973 (Pa. 1987)). In other words, did he have a "reasonable basis" for failing to recognize the apparent need to proceed pursuant to the Mental Health Procedures Act? The majority has cited the following facts from the trial court opinion, which highlight Attorney Bell's inexperience regarding competence determinations.

> s). Trial Counsel testified that he relied on the information that [Appellant's] parents/guardians had provided to him in regards to [Appellant's] condition and that he was prepared to re-visit the issue of competency with the court (TR-25).
>
> w). [Trial] Counsel testified that when the situation called for it, he was prepared to "re-visit" the issue of [Appellant's] competency (TR-26).
>
> x). Trial Counsel testified that he had sufficient information about [Appellant's] case from [Appellant's] parents/guardians, other sources and did not discuss the matter with [Appellant] (TR-28).
>
> y). Trial Counsel testified that it was his strategy to refrained [sic] from discussing specifics of the murder with [Appellant] because if [Appellant] recalled anything, it would ruin the issue of incompetency that trial counsel was trying to set up for trial (TR-28, 29).

> z). Trial Counsel testified and agreed with [Appellant's] counsel that under the law of Pennsylvania there is a procedure for determining competency (TR-30).

Majority opinion, citing trial court opinion, 6/24/99, at 6-7. (emphasis added).

Yet, despite trial counsel's supposed knowledge of the procedure for determining competence, he failed to follow any portion of that law, or provide any reasonable basis for his failure. In consideration of Appellant's severe mental incapacity, which was well documented by all parties involved, trial counsel should have immediately requested and, more importantly, followed through with his request for a competence determination in accordance with the law. Attorney Bell had a duty to inform himself fully of the facts and the law relative to Appellant's competence. However, by his own testimony, he has demonstrated his lack of understanding as to the law regarding competence determinations.

It appears that Attorney Bell believed that the Appellant's competence or incompetence should be an issue of jury determination. Attorney Bell's argument that he did not want Appellant to testify for fear of ruining the position that Appellant was not competent is inexplicable. Incompetence is not a defense to first degree murder or voluntary manslaughter. It is a fundamental question to be determined **prior** to trial.

The record reflects that just two days after he stipulated to Appellant's competence, after the preliminary hearing on August 12, 1992, he was

interviewed by a newspaper reporter who printed two (2) articles regarding this trial and the issue of Appellant's competence. Marian Fahr, the author of the articles, testified at the ineffectiveness evidentiary hearing, and explained that immediately after the preliminary hearing, Attorney Bell told her that he would again petition the court to find his client incompetent to stand trial. N.T. Evidentiary Hearing, 9/8/97, at 157. In her article, which was printed the next day, she quoted Attorney Bell's statement to that effect. Yet, for some unknown reason, Attorney Bell never again petitioned the court for a competency determination.

Not only did Attorney Bell fail to adequately follow through with a request for an examination on August 10, 1992 because he stipulated to competence, the record is replete with evidence that Attorney Bell believed that Appellant was incompetent, and yet he failed to petition the court at any time in the several months between the preliminary hearing and the trial. Attorney Bell stipulated on August 10, 1992, the preliminary hearing occurred on August 12, 1992, and the trial did not commence until February 1, 1993. Just days prior to the trial, Appellant was admitted to the hospital for seizures. In light of this fact, Attorney Bell clearly should have petitioned the court for a reexamination for competence. He failed to do so, and because of his failure, there is a reasonable probability that Appellant underwent a trial wherein he was unable to participate in his own defense. *See, Commonwealth v. Hunt*, 393 A.2d 686 (Pa. Super. 1978) (where we held that a trial court's

reliance on a psychiatrist's report some five and one-half months before trial as conclusive indicator of defendant's competency was unwarranted since report could not be deemed dispositive on the issue of competency immediately before and during trial and should not have been accepted uncritically without some attempt to scrutinize factual bases underlying conclusions).

Finally, I find no merit to the trial court's flawed conclusion that because Attorney Bell has been a public defender for approximately ten (10) years, he has provided Appellant effective assistance of counsel in this case. In fact, during the PCRA hearing, Attorney Bell testified that Appellant's case was his first experience with the competence issue. N.T., PCRA petition evidentiary hearing, at 8-9.

Because he has provided no "reasonable basis" for his failure to follow the law, the next question is whether the Appellant has demonstrated by a preponderance of the evidence that trial counsel's ineffectiveness worked to his prejudice. ***Balodis***, 747 A.2d at 344 (citing ***Davis***, 541 A.2d 315).

The majority opines that Appellant failed to demonstrate prejudice. I disagree. Again, while the standard for showing prejudice is strict, Appellant is not required to prove ***beyond a reasonable doubt*** that but for the ineffectiveness the result of the trial would have been different. (emphasis added). Rather, Appellant merely has to show by a ***preponderance of the evidence***, that there is ***reasonable probability*** that the outcome of the trial would have been different. ***Commonwealth v.***

Kimball, 724 A.2d 326, 333 (Pa. 1999). (emphasis added).

It was imperative that Attorney Bell follow the procedures identified by the Mental Health Procedures Act, to petition the court for a competence examination **at any time** prior to the trial. If he had petitioned the court, as was required, to appoint any competent **psychiatrist** to examine Appellant, there is a reasonable probability that Appellant would have been declared incompetent. However, even the expert opinions of the psychiatrists appointed after Appellant was sentenced, and after Attorney Bell was discharged, who stated that Appellant was, and is, incompetent to participate in his own defense, provide strong evidence that had he followed the proper procedures, Appellant would have been declared incompetent. Appellant should have been afforded an opportunity to be examined by a psychiatrist prior to trial. Because he was denied that opportunity, Appellant has suffered great prejudice as a result of Attorney Bell's ineffective assistance of counsel.

In conclusion, I concur in the majority's thorough analysis and conclusions regarding issues II through VIII. However, I dissent as to issue I, as I believe that the trial court erred in failing to recognize that Attorney Bell provided ineffective assistance of counsel in this case, and due to trial counsel's failure to follow the law set forth regarding competence determinations, Appellant has suffered great prejudice, in that he has been deprived of his due process right to a fair trail.

Accordingly, I would remand for further proceedings.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

EDWARD V. HUMMEL,	:	
Petitioner,	:	
v.	:	Civil Action
	:	No. 02-313J
SUPERINTENDENT FREDRIC ROSEMEYER, S.C.I. LAUREL HIGHLANDS,	:	
Respondent	:	

Report and Recommendation

Recommendation

Petitioner, serving a life sentence imposed on February 5, 1993, by the court of Common Pleas of Clearfield County, has filed a petition for a writ of habeas corpus. I recommend that the petition be denied, and that a certificate of appealability be denied.

Report

I.

The relevant parts of the state court record were filed by petitioner at docket no. 2 and docket no. 3; the respondent agrees that they are accurate. See docket no. 6 at ¶ 16. The record permits the

following findings: on the morning of Friday November 22, 1991, petitioner Edward Hummel discovered his wife Debra Martin Hummel was having an adulterous affair with Walter Maines. Debra Hummel worked as a teller at a bank in Clearfield County; Walter Maines worked at a local gas station, and saw Debra Hummel that day while using the drive through window to deposit money from the business. Debra Hummel wrote a compromising note to Walter Maines on a deposit slip, and Walter Maines' wife found the note later that day. After confronting her husband, Mrs. Maines called Edward Hummel to tell him "that your wife has been sleeping with my husband." Petitioner, who was "very calm," told her that he had learned of the affair that morning. docket no. 3 at 41a. In fact, petitioner previously had gone to Walter Maines' employer to inquire why Walter Maines was always the one making the gas station's deposits. docket no. 3 at 36a-37a. Later that day, petitioner hit his wife several times in the face and then shot her in the head with his pistol, killing her. docket no. 3 at 95 .

Petitioner's suicide attempt did not kill him, but caused him severe physical injuries and mental impairment. Petitioner's parents retained a local attorney, Kim Kesner, Esquire, who filed a petition in the Court of Common Pleas of Clearfield County to have petitioner declared incompetent and to have petitioner's parents appointed his legal guardians. On December 23, 1991, President Judge John Reilly signed the order declaring petitioner incompetent and appointing his parents as guardians. docket no. 3 at 473a-79a.

After petitioner had undergone surgery and rehabilitation at local hospitals and it was clear that he was going to live, a complaint was filed in February 1992, charging him with murder and related offenses. Kesner advised the Hummels to file a motion for appointment of counsel, docket no. 3 at 340a, and F. Cortez Bell, Esquire, the Clearfield County Public Defender, was appointed to represent petitioner. The extent of petitioner's impairments arising from his attempted suicide was an issue from the very outset, and Bell moved several times for continuance of the preliminary

hearing between March, 1992, and August, 1992, pending examinations and reports from psychologists concerning petitioner's competency to stand trial.

Allan M. Tepper, J.D., Psy.D, a forensic psychologist retained by the Commonwealth, submitted his report on August 7, 1992. docket no. 3 at 9a-17a. Tepper could not give an unqualified opinion that Hummel was currently capable of proceeding to trial, but found that Hummel possessed a "rudimentary knowledge of courtroom procedures" and appeared "capable of assimilating new material if such material is presented in a concrete, simplified fashion." Tepper noted that Hummel's short-term memory was less intact than his long-term memory. Tepper also noted that Hummel was unable to sit for prolonged periods and was easily fatigued, and thus would need some accommodation for his physical and mental limitations during any courtroom proceedings. Finally, Tepper opined that he was unable to say whether petitioner "remembers the facts and circumstances surrounding the death of his wife." A

fair reading of Tepper's conclusion in this regard would indicate that Tepper believed that "in the past" petitioner had a greater understanding of the events of November 22, 1991, and that Tepper could not reliably tell whether petitioner's statements that he "currently had no real understanding or knowledge of the whereabouts of his wife or how he sustained his physical injuries" were the result of his impairments or not.

Vincent F. Berger, Ph.D., a psychologist retained by Bell, filed his report on August 10, 1992. docket no. 3 at 18a-21a. Berger opined that Hummel was "marginally competent" to stand trial, explaining that his use of the term "marginally" was prompted by two factors:

> While Mr. Hummel is currently capable of thinking rationally in a planned and organized manner, this ability appears to wax and wane, as does his ability to attend to what is going on around him. His difficulties in these areas appear to be a result of the brain damage suffered as a result of the gun shot wound to his head.
>
> The second questionable area of Mr. Hummel's ability to participate in his defense is related to his total lack of recall of the events just prior to the shooting of his wife as well as the events

continuing through his self-inflicted injury. While Mr. Hummel recalls being very upset regarding an alleged telephone call related to the infidelity of his wife, he is not able to recall events that occurred after that time. This lack of recall was confirmed several times during the interview process. I do not believe this lack of recall is related to a conscious effort on Mr. Hummel's part to hide any information.

The difficulty in remembering events immediately prior to, and after, the death of his wife can probably be partially compensated for through the testimony of other individuals who talked with Ed near the time of his wife's death. The difficulty regarding his ability to carry on rational thought processes and to attend to what is going on is a more serious matter. I believe that this issue could be addressed by some modifications in what is traditional courtroom procedure.

Berger suggested that counsel may have to "frequently review with Ed what has just been said and/or what has just transpired" during the trial and that more frequent court breaks may be necessary to accommodate petitioner's short attention span. Berger's ultimate opinions were that petitioner did understand the nature of the charges against him and, if the modifications he suggested were made, petitioner was competent to stand trial.

Bell and Fredric Ammerman, the District

Attorney, appeared before President Judge Reilly and discussed the expert reports, see docket no. 3 at 201a, after which Judge Reilly issued the following order:

> AND NOW, this 10th day of August, 1992, the Court having received and reviewed the reports of Dr. Allen Tepper and Vincent F. Berger, the Commonwealth's and Defendant's Experts who performed separate psychological evaluations, and upon the agreement of the Commonwealth and Office of the Public Defender representing the Defendant, it is the ORDER of this Court that the Defendant is found to be competent to stand trial. Furthermore, the Court has been made aware of the physical and mental restrictions of the Defendant as set forth in the above described reports, and will take the same into account during trial or any other legal proceedings during which the Defendant's presence is required.

docket no. 3 at 2a. Petitioner's current counsel, and Judge Brosky of the Pennsylvania Superior Court in an opinion to be discussed below, repeatedly refer to the events of August 10, 1992 as Bell "stipulating" to petitioner's competency. It is clear that this is not a completely accurate characterization, since under the law of Pennsylvania the issue of competency cannot be waived, and since no one ever believed

that Bell had waived the issue of petitioner's competency, and since it would be inconsistent of the court to read the reports of the experts if he were already accepting the stipulation of counsel. The "agreement" of counsel referred to by the court appears to be, rather, that at the time both of counsel believed petitioner was competent and that no testimony was needed to supplement the reports.

The preliminary hearing took place shortly after the finding of competency, on August 12, 1992. Petitioner attended but did not testify; petitioner's father also sat with counsel at counsel table. Bell later testified that he and petitioner conferred at the preliminary hearing "about the cheating on him" docket no. 3 at 207a, and that during the testimony "Ed was whispering in my ear" instructions and suggestions to him. Bell had not met with petitioner before the day of the preliminary hearing, and did not meet with him again until jury selection in January 1993, because petitioner was released on bail at his parents' residence and the Hummels insisted that petitioner was incompetent and unable to communicate. Bell had already decided on the

defense strategy of attempting to gain an acquittal or more likely a verdict of voluntary manslaughter based on evidence of provocation. Walter Maines had testified at the preliminary hearing to the adulterous affair, and in the months before trial Bell spoke with the Hummels to prepare evidence that Debra Hummel's financial excesses were an additional cause of strain on petitioner. docket no. 3 at 210a.

The jury trial took place in February 1993. Bell, faced with the incontestable physical evidence that Debra Hummel had been beaten and shot by petitioner, pursued the two-pronged defense of provocation. The Commonwealth countered with the evidence referred to above which showed that petitioner had had time to reflect before the confrontation with Debra Hummel, and with evidence from both petitioner's teenage daughters and from Debra Hummel's brother that petitioner had previously acted violently toward Debra Hummel and had made threats to shoot her and members of her family in the past. docket no. 3 at 96a-98a, 107a-113a, 125a-127a. The jury rejected

the defense of provocation and returned a verdict of guilty to first degree murder on February 4, 1993. During the prosecutor's closing argument, petitioner made an outburst which led him to being removed from the courtroom. docket no. 3 at 154a-55a. The nature of the outburst was not described at the time and the trial transcript describes the outburst as "inaudible," which probably was intended to mean "indecipherable," but subsequent testimony indicated that petitioner had stated words to the effect of "tell them about the blow jobs" referring to alleged statement about her affair that Debra Hummel had made to petitioner shortly before her death.

Bell filed post verdict motions arguing that petitioner had been incompetent to stand trial based on the following events at trial: Bell alleged that petitioner needed to be prodded to stay awake throughout the trial, that he had fallen asleep during the testimony of the prosecution's firearms expert witness, and that he appeared to fall asleep during the prosecutor's closing until the time of his outburst. The prosecutor observed that competency

was really the only issue in an otherwise issue-free trial. Judge Reilly then engaged in this colloquy with Bell,

THE COURT: Did he cooperate with you during the course of trial and at recesses, and was he able to discuss it with you?
ATTORNEY BELL: I would characterize that as haltingly Your Honor. At times he did discuss it with me. We discussed aspects of the case quite intelligently. At other times I could not get appropriate responses. He'd forget what he was saying in mid-sentence. You know, we couldn't have a conversation, I guess would be the way to say it. docket no. 3 at 170a-71a.

Judge Reilly denied the post verdict motion and sentenced petitioner to life for the murder and to a concurrent term of 5-10 years for the aggravated assault prior to the shooting.

Bell pursued a direct appeal, raising the sole issue that the trial court erred in finding petitioner competent to stand trial in light of the conduct at trial which was "inconsistent with the evaluations received by the Court prior to trial...." docket no. 2 at 173aa-173aaaa. The Pennsylvania Superior Court affirmed the conviction and sentence, finding that the two instances of abnormal behavior at trial,

falling asleep during the firearms expert's testimony and the outburst during the Commonwealth's closing, were "insufficient to show that appellant was unable to comprehend the trial process [or] was unable to cooperate with counsel." docket no. 3 at 177a, Commonwealth v. Hummel, No. 393 Pittsburgh 1993, slip op. at 4 (Pa.Super. November 19, 1993). Bell did not proceed further. Petitioner's parents filed a petition for allowance of appeal in the Pennsylvania Supreme Court. See docket no. 2 a t10. It was denied without explanation. Commonwealth v. Hummel, No. 705 WD Alloc. Dkt. 1993 (Pa. April 15, 1994). docket no. 3 at 5a.

II.

Approximately one year later, present counsel for petitioner was retained by the Hummels and entered an appearance. After obtaining the trial transcripts, docket no. 3 at 5a, current counsel filed a petition on December 26, 1995, under Pennsylvania's Post Conviction Relief Act (PCRA), 42 Pa.C.S.§ 9541 et seq., alleging petitioner's incompetence and Bell's ineffectiveness. docket no. 3 at 178a-89a.

Judge Reilly held three days of hearings on the PCRA petition, on September 8, 1997, on November 13, 1997, an don July 20, 1998, hearing testimony from witnesses including Bell, the petitioner's parents, the petitioner's daughters , and Robert Wettstein, M.D., a forensic psychiatrist who has testified in many cases in this Court. docket no. 3 at 191a-472a. Wettstein interviewed petitioner at S.C.I. Somerset for three hours on August 30, 1996, and wrote a report opining that petitioner had been incompetent at the time of trial. docket no. 3 at 496a-503a. Judge Reilly also had a letter from William Ryan, M.D., a psychiatrist employed by the Pennsylvania Department of Corrections who has also testified in proceeding in this Court, in which Ryan opined that as of May 1996, Hummel was incompetent but that Ryan could not give a retrospective opinion on petitioner's competency at the time of trial. docket no. 3 at 481a.

Judge Reilly denied the PCRA petition in a 32 page opinion issued on June 24, 1999. See docket no. 2, Exhibit to Petition for Allowance of Appeal, and docket no. 6, Exhibit A. The PCRA testimony

presented directly conflicting testimony from Bell and from Russell Hummel, who had been at counsel table throughout the trial, about the extent to which petitioner had participated in his own defense. Judge Reilly's findings of fact declared Bell's testimony "credible and persuasive" in the following relevant particulars:

> j) During the Preliminary Hearing on August 12, 1992, Trial Counsel testified that he discussed with Petitioner, as he does with all his clients, the criminal charges filed against him, what were his legal options, and the procedures that would follow.
>
> k) Trial Counsel testified that he had a discussion with Petitioner before the Preliminary Hearing about the suicide note that he had left concerning his wife's infidelity.
>
> l) Trial Counsel testified that he explained the charges, especially, the difference between homicide and voluntary manslaughter, the defense of provocation and other matters with Petitioner.
>
> m) Trial Counsel testified that Petitioner acknowledged what counsel was explaining to him at the Preliminary Hearing.
>
> n) During the Preliminary Hearing, Trial Counsel testified that Petitioner aided in his defense by suggesting questions to counsel.

p) Trial counsel testified that he had extensive contact with the parents of Petitioner before Petitioner's jury selection.

u) Trial Counsel testified that during jury selection, Petitioner consulted with counsel and aided him in the jury selection process.

v) Based on his observation and conversations with Petitioner during his jury selection, Trial Counsel testified that Petitioner was competent, contrary to the reports that he received from the Petitioner's parents/guardians.

w) Trial Counsel testified that when the situation called for it, he was prepared to "re-visit" the issue of Petitioner's competency.

y) Trial Counsel testified that it was his strategy to refrain[] from discussing specifics of the murder with the Petitioner because if Petitioner recalled anything, it would ruin the issue of incompetency that trial counsel was trying to set up for trial.

ii) Trial Counsel testified that he would verbally describe to Petitioner what was happening in the courtroom due in pa[r]t to Petitioner suffering from certain sigh deficiencies.

iii) Trial Counsel testified that despite Petitioner's sight deficiencies, Petitioner was acknowledging and responding to his counsel's questions and remarks at every stage of the proceedings.

ix) Trial Counsel testified that when it came time during the trial to decide whether or not to have the Petitioner testify, he discussed the matter with the Petitioner and his father, who was seated at the defense table with Petitioner.

x) Trial Counsel testified that he told the Petitioner that he did not have to testify and if he didn't testify that by declining to do so [it] could not be held against him, however, if he chose to testify, the more he recalled, the change of any claim of incompetency that he wished to raise during the course of trial or on appeal would be hurt.

xi) Trial Counsel testified that he, the Petitioner, and Petitioner's father made the decision that Petitioner would not testify.

The heart of petitioner's evidence in support of the PCRA petition was the expert report and testimony of Dr. Wettstein. In his report, Wettstein noted that in addition to the interview with petitioner, he reviewed numerous reports and transcripts and also interviewed petitioner's parents. Petitioner, according to Wettstein, was aware of the charges against him, his conviction and sentence, and he recalled killing his wife, but he did not recall subsequent events, and understood concepts associated with a criminal trial, but did not recall

many specifics of his own trial. docket no. 3 at 502a. Wettstein opined that Hummel was "not able to collaborate with counsel in his own defense at the time of his February 1993 trial," because of his cognitive impairments, including his "limited attention span, reduced level of alertness, short-term memory problems, difficulty tracking or processing more than one conversation at a time, and psychomotor slowing." Id. Wettstein concluded that Hummel would not have been able to testify relevantly, challenge prosecution witnesses, or plan strategy "on a consistent basis." docket no. 3 at 503a.

Wettstein's live testimony was consistent with his report. He opined that "one would expect" that petitioner's condition could "certainly have been no better in 1993 than it was in 1996" when Wettstein examined him. docket no. 3 at 441a. Wettstein also testified that the accommodations recommended by Tepper were "entirely unrealistic" and that no attorney could be expected to "frequently interrupt the proceedings" to keep petitioner attentive. docket no. 3 at 445a. Wettstein added

that petitioner's cognitive deficits would have prevented him from being competent to select a jury in 1993. docket no. 3 at 447a. Judge Reilly found Wettstein's report and testimony not persuasive due to the limited amount of time that Wettstein had spent with petitioner three and one half years following trial.

Judge Reilly noted that under Pennsylvania law " 'a person will be deemed incompetent if he is substantially unable to understand the nature or object of the proceedings against him [or] to participate and assist in his defense . . . .' 50 P.S. Section 7402)a)." Applying this standard, the trial court ruled as follows:

> The record is clear that Petitioner was extensively examined by two (2) psychologists (one employed by the Commonwealth and the other by the Defendant). Both psychologists agreed and concluded that the Petitioner was competent to stand trial. After a meeting with the District Attorney and Trial Counsel, this Court ruled that based on the findings of both psychologists, the Petitioner was competent to stand trial.
>
> Furthermore, this Court observed the Defendant during trial and did not observe any dramatic change in his appearance or behavior throughout the proceedings. Therefore, based on the

findings of the two (2) psychologists and its own observations during the proceedings, Petitioner's claim that he is [sic] incompetent is without merit and is hereby denied.

Petitioner also alleged that Trial Counsel was ineffective due to his alleged failure to request that the Court make inquiries of Petitioner as to his competency before and during his trial. Petitioner makes reference several times to his falling asleep during the trial and his outburst at trial during the closing argument of the Commonwealth. First, the record shows that Petitioner's Preliminary Hearing was continued five (5) times, at the request of the Petitioner, in order that appropriate psychological testing could take place. In regards to the overall proceedings, Trial Counsel testified that he never felt that he had a communication problem with Petitioner. As a matter of fact, Trial Counsel stated that Petitioner would acknowledge [] the comments that counsel made to him and aided counsel with certain tactics during the overall proceedings. Moreover, this Court, itself, could have revisited the issue of Petitioner's competency by its observations of him during the trial. However, as stated before, there was no dramatic change in Petitioner's appearance or conduct.

Judge Reilly also addressed claims that counsel failed adequately to prepare for trial and had not met with petitioner. The court credited trial counsel's testimony that petitioner's parents "in

effect, refused Trial Counsel the opportunity to discuss strategy with him or see him until jury selection." Petitioner's parents did, however, discuss witnesses and court proceedings with Bell. Further, Judge Reilly stated that in addition to Bell's testimony he himself had witnesses petitioner aiding Bell during the jury selection process.

Petitioner pursued a counsel appeal to the Pennsylvania Superior Court, which affirmed the denial of the PCRA petition. Commonwealth v. Hummel, No. 1169 WDA 1999, slip op. (Pa.Super. September 28, 2001). Petitioner raised eight claims, id., slip op. at 9-10. The petitioner's claims were that Bell had been ineffective in failing to move to have petitioner found incompetent, ineffective in choosing the strategy of focusing on provocation as a partial defense, ineffective in preparing a defense, ineffective for failing to object to certain witnesses or testimony presented by the Commonwealth, and ineffective in his closing argument for misstating the law of voluntary manslaughter and for failing to object to a portion of the prosecution's closing argument. Petitioner also presented the claims that

Judge Reilly had abused his discretion in rejecting Wettstein's testimony, that petitioner had not waived his constitutional right to be present during the balance of the prosecution's closing argument, and that Judge Reilly's denial of the PCRA petition was an "unfair and partial review of the facts and law." Subsumed within the ineffectiveness claim based on petitioner's competency were arguments that Bell had failed to follow the procedures outlined in the Pennsylvania Mental Health Procedures Act, 50 P.S. § 7101, et seq., and that Bell had failed to secure a psychiatrist to examine Petitioner or to request a hearing on the issue of competency. See Commonwealth v. Hummel, No. 1169 WDA 1999, slip op. at 9-10.

The Pennsylvania Superior Court observed that it would defer to the PCRA court's factual findings and determinations of credibility. On the law, the appellate court held that Bell had not been ineffective in not requesting a competency hearing because the procedures set forth in the Mental Health Procedures Act were not mandatory, but were within the discretion of the court. id., slip op.

at 14-15, 17. On the main issue of competency, the appellate court held:

> We also observe that Appellant has failed to demonstrate that counsel's actions caused him prejudice. Appellant failed to show that had counsel requested a competency examination under the Act, the trial court would have exercised its discretion and ordered the examination. Appellant also failed to show that the examination would have established that he was incompetent to stand trial. Appellant in addition failed to show that this evidence, together with any evidence offered by Appellant, would have been clear and convincing on the issue of competence. Thus, Appellant fails to demonstrate that counsel was ineffective with respect to the issue of competency to stand trial. (footnote omitted)

id., slip op. at 17-18. The Pennsylvania Superior Court refused to entertain petitioner's claim (not presented as an ineffectiveness claim) that he had been incompetent at trial because that claim had been raised on direct appeal and was barred under Pennsylvania law because it had been previously litigated. id. slip op. at 19.

The appellate panel rejected the ineffectiveness claims based on Bell's choice of defense strategy, preparation, and failure to object to

the Commonwealth's closing, holding alternatively that the issues had been waived (the claim that Bell should have sough individual voir dire due to pretrial publicity, and the claim that Bell should have objected to some witnesses, sought offers of proof as to those witnesses, or cross-examined those witnesses differently), Bell's decisions were correct (Bell correctly stated Pennsylvania law during his closing, Bell was not ineffective for calling a character witness), or that any error Bell might have committed caused no prejudice to petitioner (Bell's failure to object to the Commonwealth's closing, Bell's opening the door to rebuttal character witnesses). Finally, the claim that petitioner had been denied his constitutional right to be present during trial was rejected on the merits, the appellate court finding that the removal of a disruptive defendant from the courtroom was proper.

Petitioner relies heavily on the partial dissent of Judge Brosky, who joined the appellate panel in rejecting all of petitioner's claims, save one. Judge Brosky opined that the claim of ineffectiveness based on Bell's failure to invoke the procedures of the

Mental Health Procedures Act, and to seek the appointment of a psychiatrist and a competency hearing under the Act, had merit. Judge Brosky called attention to the fact that petitioner had suffered a seizure a few days prior to trial, and he was troubled both by Bell's failure to make a record of his efforts to adhere to the recommendation s for accommodation of petitioner's limitations made by Dr. Tepper and Dr. Berger, and by Bell's failure to revisit the issue of competency before trial instead of attempting to litigate the issue at the conclusion of trial.

Petitioner filed a counseled petition for allowance of appeal, docket no. 2, which presented essentially the same claims as those raised in the Superior Court. id. at 9-10. It was denied without explanation by the Supreme Court of Pennsylvania on June 19, 2002. Commonwealth v. Hummel, No. 610 WAL 2001 (Pa. June 19, 2002).

III.

The federal habeas corpus petition focuses upon petitioner's competence to stand trial, and Bell's effectiveness in presenting that issue.

Petitioner alleges on claim, that trial counsel was ineffective in finding to have petitioner declared incompetent, and his petition sets forth the factual particulars of that claim:

a) He never interviewed petitioner to determine, for himself, petitioner's degree of incompetence and his inability to communicate;
b) He failed to follow the Mental Health Procedures Act, and to have a psychiatrist examine petitioner and to request and evidentiary hearing before the trial judge, on the matter of petitioner's incompetence;
c) He failed to remind the judge that he had already, in December, 1991, appointed petitioner's parents as guardians (473a-479a)
d) He failed to conduct the trial as instructed and cautioned by the psychologists who did examine petitioner;
e) The neurosurgeon who operated upon petitioner testified at trial, but defense counsel never questioned him about the brain damage suffered, its impact on cognitive functions or the areas of the brain which were damaged and impacted upon loss of cognitive function (68a);
f) Trial counsel was not prepared, after trial, to respond to the judge's inquiry as to medical evidence to support incompetency, nor was there any request to postpone sentencing and to move for a hearing on incompetency (168a-173a);
g) He erroneously stipulated to competency, without a hearing, without the knowledge or consent of the petitioner or his guardians;

h) He, in fact, had no prior experience in his public or private capacity with the issue of incompetence to stand trial;
I) Before and during the trial and before verdict, he never advised the trial judge he had not communicated with his client about the extent of the brain damage, loss of short-term memory or the facts of the case (208a-211a);
j) He did not adhere to the advice of petitioner's parents that their son was not competent and needed to be examined by a psychiatrist, and that provided him with the names of such physicians (286a-290a);
k) He had no knowledge of the law of incompetency and erroneously believed the issues could be raised at trial, and it never was (214a-217a, 220a-225a-236a, 267a-278a);
l) He failed to advise the court that petitioner was not able to sit in the courtroom and listen to the end of the District Attorney's closing argument (240a-241a);
m) He admitted he intended to "revisit" the issue of petitioner's competency (he never visited it in the first place), and he never did (286a-289a, 292a, 349a-352a);
n) Had trial counsel consulted with experts, he could have proved by ample testimony that petitioner was not competent to stand trial in February, 1993 (424a-429a, Mr. Furgiuele and Robert M. Wettstein, M.D. a psychiatrist, 430a-469a). docket no. 1, ¶9.

There is no supporting brief from the petitioner. The respondent has made only a token effort to discuss

federal law.

Turning to the claim of ineffectiveness advanced by petitioner, a federal habeas petitioner may obtain a review of an asserted erroneous determination by the state courts of the merits of a federal claim in one of two ways. Under 28 U.S.C. §2254(d), the petitioner must show that the state court's adjudication of his claim:

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court; or
(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Findings of fact made by a state court Atty. Ryan: presumed to be correct, and petitioner bears the burden of rebutting the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

A.

In Williams v. Taylor, 529 U.S. 362, 411-13 (2000), the United States Supreme Court discussed the independent meanings of the "contrary to" and

"unreasonable application" clauses contained within § 2254(d)(1):

> Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

The Supreme Court further clarified that a federal habeas court making the unreasonable application inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable. 529 U.S. at 409. "Under §2254(d)(1)'s unreasonable application clause, then, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." 529 U.S. at 411. These standards apply also to mixed questions of fact and law, such

as whether trial counsel provided effective assistance of counsel. Werts v. Vaughn, 228 F 3d 178, 204 (3d Cir. 2000), cert. denied, 532 U.S. 980 (2001).

The federal legal standard applicable to the claim of ineffective assistance of counsel derives from the Sixth Amendment right to counsel. That right exists "in order to protect the fundamental right to a fair trial." Lockhart v. Fretwell, 506 U.S. 364, 368 (1993) (quoting Strickland v. Washington, 466 U.S. 668, 684 (1984)).

Thus the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial. Absent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated.

Fretwell, 506 U.S. at 369 (citing United States v. Cronic, 466 U.S. 648, 658 (1984)). See also Kimmelman v. Morrison, 477 U.S. 365, 374 (1986) (the essence of a claim alleging ineffective assistance is whether counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and

the verdict rendered suspect).

The Supreme Court requires a petitioner to prove two elements to show a former counsel rendered constitutionally ineffective assistance: 1) counsel's performance was unreasonable; and 2) counsel's unreasonable performance actually prejudiced the defense. Strickland v. Washington, 466 U.S. at 687. To determine whether counsel performed below the level expected from a reasonably competent attorney, it is necessary to judge counsel's challenged conduct on the facts of the particular case, viewed at the time of counsel's conduct. Strickland v. Washington, 466 U.S. at 690.

The first prong of the Strickland test requires a defendant to establish that counsel's representation fell below an objective standard of reasonableness by committing errors so serious that he or she was not functioning as the "counsel" guaranteed by the Sixth Amendment. Strickland v. Washington, 466 U.S. at 688. A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the

presumption that, under the totality of the circumstances, the challenged action "might be considered sound trial strategy." Strickland v. Washington, 466 U.S. at 689. The question is not whether the defense was free from errors of judgment, but whether counsel exercised the customary skill and knowledge that normally prevailed at the time and place. id.

The second prong requires a defendant to demonstrate that counsel's errors deprived him of a fair trial and the result was unfair or unreliable. id. To prove prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. at 694 (emphasis added). A "reasonable probability" is one that is sufficient to undermine confidence in the outcome. Id. In other words, a petitioner must show a "reasonable likelihood that ... information [not presented] would have dictated a different trial strategy or led to a different result at trial." Lewis v. Mazurkiewicz, 915 F.2d 106, 115 (3d Cir. 1990). A different outcome

must not be merely possible, but probably. McNeil v. Cuyler, 782 F.2d 443, 451 (3d Cir.1986). In the context of this petition, the probable alternative outcome is not acquittal, but a finding of incompetency.

If petitioner's evidence fails to prove both elements required by Strickland v. Washington, his claim fails, because "There is no reason for a court deciding an ineffective assistance claim to . . . address both components of the inquiry if the defendant makes insufficient showing on one." Strickland v. Washington, 466 U.S. at 697.

B.

The state court applied the proper standards in making its determination regarding counsel's effectiveness. Under Pennsylvania law, counsel is ineffective if counsel's conduct had no "rational, strategic or tactical basis," and "in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place." 42 Pa.C.S.§ 9543(a). Pennsylvania's law of ineffective assistance of counsel is substantially identical to

Strickland v. Washington. Werts v. Vaughn, 228 F.3d at 203. The state court also applied the correct standard for competency to stand trial. A defendant is competent to be tried if "(1) [he] has the present ability to consult with [defense counsel] with a reasonable degree of rational understanding and (2) [he] has a rational as well as factual understanding of the proceedings." U.S. v. Leggett, 162 F.3d 237, 242 (3d Cir.1998) (internal quotations omitted); see also Dusky v. United States, 362 U.S. 402, 403 (1960) (defendant must have "rational as well as factual understanding of the proceedings against him" and sufficient "ability to consult with his lawyer with a reasonable degree of rational understanding"). As Judge Reilly noted, Pennsylvania law likewise provides that " 'a person will be deemed incompetent if he is substantially unable to understand the nature or object of the proceedings against him [or] to participate and assist in his defense . . . .' 50 P.S. Section 7402(a)." The state court's rulings were not based on a standard contrary to established federal law.

C.

Examining precedent to determine whether the state court's application of the proper standards was unreasonable, it is clear that the failure to seek a competency evaluation or hearing can be considered ineffective assistance of counsel. See Jermyn v. Horn, 266 F.3d 257, 300 (3d Cir.2000). In Jermyn, the Court of Appeals stated that:

> Clearly, an attorney would render ineffective assistance of counsel if he or she failed to inquire into defendant's competency and failed to request a competency hearing, despite indicia of incompetence that would provide reasonable counsel "reason to doubt" the defendant's ability to understand the proceedings, communicate with counsel, and assist in his own defense.

Here, Bell had "indicia of incompetence" which would lead a reasonable attorney to doubt petitioner's "ability to understand the proceedings, communicate with counsel, and assist in his own defense" in this case. But, unlike counsel in Jermyn, Bell did explore facts concerning petitioner's competence, and obtained reports from two expert who examined petitioner.

Petitioner, echoing Judge Brosky, argues that counsel was per se ineffective for stipulating (as he

characterized it) to his client's competence, and that counsel ad an "absolute need" to invoke the procedures of the Mental Health Procedures act. docket no. 1 at 5. This is not the law of Pennsylvania, however, as both the trial court and the Pennsylvania Superior Court have explained. (While a failure to follow state law cannot be the basis for a claim that a petitioner's federal constitutional rights were violated, failure of counsel to avail himself of state law defenses can be a violation of the Sixth Amendment). A motion from Bell possibly could have caused Judge Reilly to hold a competency hearing, but Bell had two expert reports from experts whose expertise and foundation for their opinions have never been questioned, stating that petitioner was competent. Bell's own expert was even slightly more positive than the Commonwealth's expert about petitioner's competency. Under the circumstances, it appears that counsel spoke to the trial judge, and decided to go ahead with the preliminary hearing. Bell testified that at the preliminary hearing petitioner was competent and did assist in his own defense.

Judge Reilly credited that testimony. Under the circumstances, what Judge Brosky found inexplicable is quite explicable: Bell met his client and was able to confer with him to prepare for trial at the preliminary hearing. Because Bell believed his client to be competent, as an officer of the Court he did not consider it his duty to file a motion to hold a competency hearing merely on the chance that Judge Reilly would find his client incompetent to stand trial. Despite the position of some to the contrary, it is not part of the constitutional obligation of defense counsel to file every available motion, especially ones for which counsel believes there is no sufficient factual basis. In hindsight, a competency hearing might have been successful, and would have not hurt petitioner, but neither hindsight nor "might not have hurt" are part of the Strickland v. Washington test: the question is whether the course counsel did take had some reasonable basis to advance his client's interests. Clearly Bell had a trial strategy which did not depend on incompetency, and given the factual basis for that defense and the success which the defense of

provocation based on infidelity often has, that strategy was a constitutionally effective one. Bell was also, Judge Reilly found, prevented from speaking with petitioner before trial by petitioner's parents, but nevertheless was able to prepare an additional defense of provocation based on the theory that Debra Hummel's spending was emotionally destabilizing to petitioner. The finding that Bell was not ineffective under the first Strickland v. Washington prong was not an unreasonable application of federal law, nor was it based on an unreasonable determination of the facts.

D.

Even assuming, however, that Bell was required by the Sixth Amendment to take every action which present counsel points out he did not take, the state courts, both Judge Reilly and the Pennsylvania Superior Court, have ruled that no prejudice resulted. Commonwealth v. Hummel, No. 1169 WDA 1999, slip op. at 17. This finding of no prejudice rests on the determination by the state court, id., that petitioner "failed to show the examination [under the Mental Health Procedures

Act] would have established Appellant was incompetent to stand trial." Despite the inelegance of phrasing, it is plain that the state appellate court's finding of no prejudice is based on the finding of fact that petitioner was in fact competent: it would be absurd to construe the Pennsylvania Superior Court opinion as holding that petitioner suffered no prejudice from counsel's action even if he were incompetent. A finding of competency is a finding of fact, which even under prior habeas corpus law was entitled to deference. See Demosthenes v. Baal, 495 U.S. 731, 735 (1990), citing Maggio v. Fulford, 462 U.S. 111 (1983). This finding by the Pennsylvania Superior Court ultimately was based on Judge Reilly's factual determination that petitioner was competent, which Judge Reilly based on his personal observation of both jury selection and trial and the statements by Bell that he had been able to confer with petitioner at trial. Not only was Judge Reilly in a position to make extended observation of petitioner during trial, he was obligated to be alert to signs that a defendant has become incompetent during trial. Drope v. Missouri, 420 U.S. 162, 181

(1975). Further, at the PCRA hearing, Judge Reilly also had the testimony of petitioner's daughters that petitioner was able to converse normally (under the circumstances) with them at the time of trial. Judge Reilly found that the evidence of incompetence petitioner presented at the PCRA hearing from petitioner's parents and from Dr. Westtstein, which petitioner erroneously characterized as unrefuted, docket no. 1 at 4, was not persuasive.

Rendered to its essence, because petitioner cannot show ineffective assistance of counsel without proof of prejudice, and cannot show prejudice unless he was incompetent at the time of trial, the inquiry in this case becomes whether the state court erred in ruling that petitioner was competent, and if it erred did it err so badly as to be "unreasonable." See Williams v. Pliler, 2006 WL 700945 (9th Cir. March 20, 2006). Bell testified that he believed his client to be competent at all times, and that petitioner did participate in his own defense. Even though Judge Brosky and petitioner's current counsel find it damning that Bell did not make a better record, Bell testified to his continuing efforts during trial to

make certain petitioner maintained attention to the proceedings. The PCRA court found this testimony credible. On the limited review permitted in habeas corpus, a federal court could not say, unless it had already predetermined that petitioner was incompetent, that it was erroneous for the state court to believe a defense counsel's testimony that his client was competent.

It is important to recognize that no expert witness, including Dr. Wettstein, doubted petitioner's ability to understand his position as one accused of a crime, or of his ability to understand at least the basics of the criminal proceeding. The bases for Wettstein's opinion of incompetence, and of the accommodations at trial recommended by Tepper and Berger, were petitioner's limited ability to maintain his attention, and his limited ability to digest and retain information from trial. None of the experts actually observed Hummel during either the preliminary hearing or trial. Trial counsel and the trial court did observe petitioner in that setting, and their observations are competent evidence. See Warren v. Schriro, 2006 WL 44451, *2 (9th Cir.

January 10, 2006) (trial counsel's decision to forego an insanity defense without first having an incompetency hearing was not ineffective assistance of counsel where, based on his contacts, counsel had no doubts about his client's competency). This Court is not in a position to require that the state court accept the testimony of Dr. Wettstein. The two contemporaneous expert opinions each support the trial court's observations that petitioner was competent to stand trial[1]. Although the trial court was not
obligated to rule as it did, petitioner had not shown that the factual rulings made in this case were unreasonable. This being the case, the state court cannot be said to have engaged in an unreasonable

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1. One argument repeatedly raised in this case is that Hummel had an inappropriate outburst during the prosecutor's closing. Despite showing a lack of impulse control, this is not necessarily evidence of incompetence. In fact, one was to view petitioner's outburst during the prosecutor's closing argument is that Hummel was paying very close attention to the proceedings, and particularly at that point. He certainly seemed to recall what it was about his wife's conduct which had made him sufficiently upset with her to beat and then to kill her.

application of the Strickland v. Washington standard.

The petition must be denied. Because under the limited review permitted I believe reasonable jurists could not come to different conclusions about the correctness of the state court's conclusion about trial counsel's effectiveness, I also recommend that a certificate of appealability be denied.

Pursuant to 28 U.S.C. § 636(b)(1), the parties are given notice that they have ten days to serve and file written objections to this Report and Recommendation.

Date: 29 March 2006 /s/ Keith A. Pesto
Keith A. Pesto
United States Magistrate
Judge

Notice to:

H. David Rothman, Esquire
5825 Fifth Avenue, Suite 104-1
Pittsburgh, PA 15232

William A. Shaw, Jr., Esquire
Office of the District Attorney
230 E. Market Street
Clearfield, PA 16830

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

EDWARD V. HUMMEL,	:	
Petitioner,	:	
v.	:	Civil Action
	:	No. 02-313J
SUPERINTENDENT FREDRIC ROSEMEYER,	:	
S.C.I. LAUREL HIGHLANDS,	:	
Respondent	:	

MEMORANDUM ORDER

This matter was referred to Magistrate Judge Keith A. Pesto for a Report and Recommendation in accordance with the Magistrates Act, 28 U.S.C. § 636(b)(1), and subsections 3 and 4 of Local Rule 72.1 for Magistrate Judges.

The Magistrate Judge filed a Report and Recommendation on March 30, 2006, docket no. 7, recommending that the petition be denied, and a certificate of appealability denied.

The parties were notified that pursuant to 28 U.S.C. § 636 (b)(1), they had ten days to serve and file written objections to the Report and Recommendation. Petitioner filed timely objections,

docket no. 8, but the objections are meritless. Petitioner argues that Judge Reilly improperly found petitioner competent to avoid finding defense counsel ineffective, and that the finding by the Pennsylvania Superior Court that trial counsel had not been ineffective because petitioner suffered no prejudice "is proof that they did not understand this case." docket no. 8 at 5. AEDPA requires me to give deference to state court adjudication of petitioner's claims, and also forbids de novo review of findings of fact. See Rolan v. Vaughn, No. 04-4322, slip op. at 11-13 (3d Cir. April 18, 2006). On the basis of the record, I cannot conclude that the state court adjudication of petitioner's claim was an unreasonable application of Strickland v. Washington. Even if my review were de novo, I would not conclude that the trial court's unfavorable ruling was the result of an improper desire to protect defense counsel, nor the appellate court's unfavorable ruling was evidence of error.

After de novo review of the record of this matter, together with the Report and Recommendation and the timely objections thereto,

the following order is entered:

AND NOW, this 20th day of April, 2006, it is

ORDERED that the petitioner's petitioner for a writ of habeas corpus is denied. A certificate of appealability is denied. The Report and Recommendation is adopted as the opinion of the Court. The Clerk shall mark this matter closed.

BY THE COURT:

/s/ Kim R. Gibson
KIM R. GIBSON
UNITED STATES DISTRICT JUDGE

Notice to:

H. David Rothman, Esquire
5825 Fifth Avenue, Suite 104-1
Pittsburgh, PA 15232

William A. Shaw, Jr., Esquire
Office of the District Attorney
230 E. Market Street
Clearfield, PA 16830

BLD-49

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **06-2711**

EDWARD V. HUMMEL

VS.

FREDERICK ROSEMEYER, ET AL.

(W.D. Pa. Civ. No. 02-cv-00313J)

Present: MCKEE, FUENTES AND ROTH, CIRCUIT JUDGES

Submitted is Appellant's request for a certificate of appealability under 28 U.S.C. § 2253(c)(1) in the above-captioned case.

Respectfully,

Clerk

MMW/EGL/lml

ORDER

The foregoing request for a certificate of appealability is granted as to the following issue: whether the District Court erred in denying on the merits appellant's claim that his trial counsel rendered ineffective assistance to appellant's

prejudice by "agreeing" at the August 10, 1992 conference that appellant was competent to stand trial and by declining either to request a psychiatric evaluation of appellant and a competency hearing under the provisions of the Pennsylvania Mental Health Procedures Act codified at 50 P.S. § 7402 or to otherwise revisit the issue of appellant's competence before trial.

By the Court,

/s/ Theodore A. McKee
Circuit Judge

Dated: May 10, 2007

LML/cc: H. David Rothman, Esq.
William A. Shaw, Jr., Esq.

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 06-2711

EDWARD V. HUMMEL,
Appellant

v.

FREDERICK ROSEMEYER, Superintendent;
Esquire *TOM CORBETT ATTORNEY GENERAL
OF THE COMMONWEALTH OF PENNSYLVANIA

*{Substituted pursuant to F.R.A.P. 43 (c)}

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. No. 02-cv-00313J}
District Judge: Honorable Kim R. Gibson

---

*Honorable A. Wallace Tashima, Senior Judge of the united States Court of Appeals for the Ninth Circuit, sitting by designation.

Argued October 30, 2008

Before: SLOVITER, STAPLETON and TASHIMA*,
Circuit Judges

(Filed April 29, 2009)

H. David Rothman (Argued)
Pittsburgh, PA 15232

Attorney for Appellant

Leanne R. Nedza (Argued)
William A. Shaw, Jr.
Office of the District Attorney
Clearfield, PA 16830

Attorneys for Appellees

OPINION OF THE COURT

SLOVITER, Circuit Judge.

We are once again faced with the need to determine whether the state court determination that counsel representing a petitioner in a state court criminal action provided competent counsel as required by the Sixth Amendment survives our review under 28 U.S.C. § 2254.

Edward Hummel, who is missing a portion of his brain after a self-inflicted gunshot wound, sought a writ of habeas corpus, contending that his trial counsel failed to perform up to the constitutional standard when he (1) stipulated that Hummel was competent to stand trial and (2) did not seek to have Hummel evaluated by a psychiatrist before trial. The District Court denied Hummel's request for a writ of habeas corpus. We will reverse.

I.

Background

A. The Murder

Hummel was married to Debra Hummel, and the couple had two teenage daughters. Unknown to Hummel, Debra was having an affair with Walter Maines. Maines' wife telephoned Hummel about the affair on November 22, 1991, and Hummel responded that he had learned of the affair that morning. When Debra came home that night she confirmed the affair. Some aspect of Debra's sexual activity and Hummel's reaction was provided by Hummel's mother, who testified at the PCRA hearing that Hummel asked her if she knew "that Debbie told me that she had performed oral sex on

men, and then came home and kissed me 15 minutes later?" R. at 3701a. [1] Shortly after Debra admitted her actions to Hummel, he hit her in the face several times and then shot her in the head, killing her. Hummel then went to his parents' house and told them what he had done. Thereafter, he left a suicide note for his daughters, and returned to his house where he shot himself in the head with the same gun. Hummel survived, but was rendered a paraplegic and suffered brain damage from the shot.

B. Pre-trial Events

Immediately after the shooting, Hummel was hospitalized from November 22, 1991, to December 30, 1991, was then transferred to a rehabilitation center until February 25, 1992, then again hospitalized in a psychiatric unit for suicidal ideation until March 4, 1992, was again briefly hospitalized until March 9, 1992, and thereafter received outpatient care while he was out on bail living with his parents when it became clear that he

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[1] After oral argument, we obtained a copy of the record before the Western District of Pennsylvania in Hummel's habeas claim, which we cite in this opinion as "R. at ___." We also note that Volume II of the Appendix, as well as the record, are not numbered sequentially. Reference to the appropriate appendix or record page is confused because the pages in one of the appendices, Volume II, are variously numbered, for example, 24a, 2aa, and 24aaa. Finally, only portions of transcripts have been included, and although they often fail to identify the speaker, we have made the identification from the context.

would not die from the self-inflicted wound, he was charged by the Commonwealth of Pennsylvania with his wife's murder (among other related crimes). F. Cortez Bell, a public defender for Clearfield County, was appointed as Hummel's counsel, and represented him at the bail hearing in March 1992. Hummel's parents, but not Hummel, were present. The court granted bail and Hummel returned to his parents' home.

Bell obtained several continuances of the preliminary hearing so that Hummel could be examined to determine whether he was competent to stand trial. During these continuances, Hummel was examined by two psychologists: Allan M. Tepper, J.D., Psy.D, and Vincent F. Berger, Ph.D. In his report, Dr. Tepper, who was retained by the District Attorney, stated that he "is unable to state, within a reasonable degree of psychological certainty, whether or not Mr. Hummel currently is capable of proceeding to trial." R. at 17. Dr. Berger, retained on behalf of the Public Defender, found that Hummel was "marginally competent" to stand trial provided modifications were made to ensure that Hummel was able to understand what was going on and to accommodate his short attention span. R. at 20. Their reports were filed with the court. Bell did not seek an additional evaluation either then or thereafter.

Bell did file a motion on August 7, 1992, requesting a competency hearing but a few days later, on August 10, 1992, Bell and the attorney for the Commonwealth reached an agreement that

Hummel was competent to stand trial. Bell did not consult with Hummel's parents, who were Hummel's court appointed guardians, about this stipulation.

It is significant that at the time Bell made this agreement he still had not yet met with Hummel because, he states, Hummel's parents – who insisted their son was "incompetent and unable to communicate" – did not allow Bell contact with Hummel. In fact, Bell, who was appointed in March 1992, met with Hummel for the first time on the day of Hummel's preliminary hearing, August 12, 1992, shortly before the hearing began. This was despite the fact that Hummel had been living at his parents' house since his release following the bail hearing on March 6, 1992. Bell, in fact, did not speak to Hummel again until jury selection began in January 1993, saying later that he had taken Hummel's parents at their word that their son remained incompetent. Of particular relevance is the fact that Bell did not bring Hummel's parents' doubts as to Hummel's competency to the attention of Judge John Reilly, the trial judge.

C. The Trial

Although Hummel's provocation defense would likely have been strengthened by his testimony as to his wife's admission of sexual conduct with other men,[2] Bell convinced Hummel

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[2] Under Pennsylvania law, voluntary manslaughter covers a defendant acting "under a sudden and intense passion resulting from serious provocation." 18 Pa. Stat. Ann. § 2503.

and his father that Hummel should not testify during the trial. Bell told them that anything Hummel said while on the stand would undermine "any claims of incompetency tha[t] anyone wished to raise at any point whether during the course of trial or on appeal or whatever." App. At 32a. Thus, the trial proceeded without Bell having discussed with Hummel his recollection of the shooting, his reasons for the shooting, and his state of mind. Although Bell would later, at the PCRA hearing, express his concerns about Hummel's ability to focus on the trial proceedings, Bell did nothing to note this for the record at the time of the trial. When Bell noticed that during the trial Hummel "was down on the table, could not be roused, could not be awoken," App. At 45a, he approached the bench and, without explanation to the court, requested a recess, which the court granted. During the prosecution's closing, Hummel suddenly woke up and shouted "[t]ell them about the blow jobs." App. At 37a. Hummel's statement is not recorded in the trial transcript, but Bell's testimony regarding the outburst is not challenged. At this point, Bell covered Hummel's mouth and Hummel's father removed Hummel from the courtroom. The prosecutor's closing statement continued with Hummel absent from the room.

The trial court asked Bell whether he would like Hummel back in the room for the jury instructions, but Hummel was not brought back into the room because Bell was unable to wake him. Bell did not tell the judge that Hummel was asleep, nor did he seek an opportunity to question Hummel about the outburst, which referred to his wife's

admission of recent oral sex with others. Bell never questioned Hummel about the murder, even after Hummel's outburst.

The trial continued and Hummel was found guilty by the jury of first degree murder and assault. Bell then filed what he characterized as a motion for a new trial. This motion was based on events occurring during the trial that Bell said he believed raised questions about Hummel's competency. The court asked whether bell had any additional medical evidence regarding the competency, and he responded that he did not. The following exchange then occurred:

> The Court: Did he cooperate with you during the course of trial and at recesses, and was he able to discuss it with you?
>
> Bell: I would characterize that as haltingly, Your Honor. At times he did discuss it with me. We discussed aspects of the case quite intelligently. At other times I could not get appropriate responses. He'd forget what he was saying in mid-sentence. You know, we couldn't have a conversation, I guess would be the way to say it.

App. At. 64a-65a.

The court found Hummel could not be considered incompetent on that evidence alone and the motion for a new trial. Hummel was sentenced to life imprisonment for the murder and a term of 5-10 years for the assault prior to the murder.

D. Post Trial Proceedings

Bell pursued a direct appeal, challenging the decision of the trial judge that Hummel was competent to stand trial. The Pennsylvania Superior Court affirmed Hummel's conviction and sentence.

One year later Hummel's parents hired a new attorney, H. David Rothman, who represented Hummel here. Rothman filed a petition under the Pennsylvania Post Conviction Relief Act ("PCRA"), and also hired a psychiatrist, Dr. Robert Wettstein, who was Board certified in psychiatry and forensic psychiatry. Dr. Wettstein reviewed the trial transcript, some of the rehabilitation records following Hummel's brain surgery (resulting from his self-inflicted wound), and interviewed Hummel in jail.

Hummel was not present at the PCRA hearing. Dr. William Ryan, a psychiatrist who had been following Hummel's condition while he was at SCI Somerset, advised the court by letter dated May 23, 1996, as follows:

> [Hummel] does continue to reflect elements of cognitive brain impairment . . . .This impairment is primarily centered around trouble with memory/recall. Mr. Hummel can

not follow a conversation if more than one person is speaking simultaneously. He continues to be essentially bed fast and helpless in ambulation functions. He feeds himself quite easily. He displays a cordial manner and expresses himself adequately. He does not always comprehend what he hears. There are elements of both expressive and receptive aphasia. It has been noted also that Mr. Hummel frequently avoids taking medication, as nursing staff tends to find pills secreted about his bed area from time to time.

From a mental status standpoint and with reasonable medical certainty, I believe Mr. Hummel would be essentially not competent to understand a court procedure nor to participate with defense counsel in his own behalf. This opinion is arrived at from observing him on a daily basis in respect to his memory incapacity, limited attention span, misperception of conversation and difficulty in self expression. I do not have an opinion about the mental competence of this individual at the time of his trial in your court.

App. At 481a.

Hummel's attorney waived Hummel's appearance; his parents, who were the guardians appointed by the court, were present. Bell, Hummel's trial counsel, whose performance was and is at issue, appeared by subpoena as the court's witness.

Bell, who testified about his performance before, during, and after the trial, stated that in light of the injuries Hummel had suffered he and the Commonwealth both believed they needed to have Hummel independently examined to determine his competency. He was familiar with Pennsylvania's Mental Health Procedures Act, but filed a petition for a determination of Hummel's status, not a petition to find him incompetent. He knew that a psychiatrist, unlike a psychologist, was a medical doctor but he did not seek appointment of a psychiatrist for Hummel.

Bell testified that he had extensive correspondence from Hummel's parents who told him they believed Hummel was not only physically incompetent to do certain things but also mentally incompetent. The Hummels had given Bell a list of various psychiatrists, particularly forensic psychiatrists, that could be used. Nonetheless, after he and the District Attorney reviewed the reports of the psychologists, which he stated indicated that Hummel was competent subject to reservations in terms of monitoring the trial, they sat down with the trial judge and agreed to a stipulation, leading to the court order that Hummel was competent to stand trial. It is important to emphasize that Bell's stipulation was made before he ever met Hummel. Despite Bell's failure to ascertain the underlying facts from Hummel, he testified that his approach was to defend by trying to convince the jury that Hummel was either not guilty or guilty of no more than voluntary manslaughter because he had sufficient legal provocation.

Bell's pretrial contact with Hummel was limited to the preliminary hearing. He stated, "On the day of the preliminary hearing before going into the courtroom was the first time he and I ever spoke." R. at 208a. Bell stated that during the preliminary hearing, Hummel continually whispered things in his ear while the witnesses were speaking. Bell did not speak with Hummel between August 12, 1992, the day of the preliminary hearing, and January 1993, when jury selection began. Hummel's parents, with whom Hummel was living, "led [Bell] to believe that [Hummel] was incompetent; that he was sliding backwards; that he was not recovering or had any hope of recovery." R. at 210a. Bell took them at their word and therefore did not go to see Hummel. Bell conceded that he did not advise the trial judge that Hummel's parents believed Hummel was not competent and that he had not spoken with Hummel between the brief encounter at the preliminary hearing and the trial.

Dr. Wettstein, the psychiatrist hired by Hummel's counsel, testified at the PCRA hearing that he concluded that Hummel had been incompetent at the time of trial. The testimony of Dr. Wettstein was challenged by the state because Dr. Wettstein had examined Hummel in August 1996, three years after the trial. Dr. Wettstein explained that he reached the conclusion that Hummel was incompetent at the time of his trial because at the time of his examination of Hummel, Hummel displayed a "limited attention span, reduced level of alertness, short-term memory problems, difficulty tracking or processing more than

one conversation at a time, and psychomotor slowing." R. at 502a. Dr. Wettstein further testified that Hummel would not have been expected to have been any better during the trial than he was when examined; indeed, his condition would have been expected to improve over time. Therefore, he was able to conclude that Hummel was incompetent during the trial.

Judge Reilly, the state judge who had originally presided over Hummel's trial, also was the PCRA judge, and he denied the PCRA petition.

E. The Decision of the Pennsylvania Superior court

Hummel appealed the denial of his PCRA petition to the Pennsylvania Superior Court, which affirmed by a divided decision. The two-judge majority concluded that under sections 7402(c) and (e) of the Pennsylvania statute governing competency hearings, the Mental Health Procedures Act, 50 Pa. Stat. Ann. § 7101 et seq., Bell had no obligation to push for a competency hearing. The relevant portion of section 7402(c), which deals with requests by counsel for incompetency hearings, states:

> Application to the court for an order directing an incompetency examination *may be presented* by an attorney for the Commonwealth, a person charged with a crime, his counsel, or the warden or other official in charge of the institution or place in which he is detained.

50 Pa. Stat. Ann. § 7402(c) (emphasis added).

The Superior Court interpreted this provision to mean the decision to request a hearing lay within the discretion of counsel. It contrasted this provision with section 7402(e) which states, "[w]hen ordered by the court, an incompetency examination . . . shall be conducted by at least one psychiatrist . . ." 50 Pa. Stat. Ann. § 7402(e). The Superior Court majority found that section 7402(e) was indeed mandatory, but that it was only triggered after an evaluation had been ordered. Based on these conclusions, the court held that Bell could not be considered ineffective for failing to have Hummel examined by a psychiatrist because the mandatory provisions of the statute had not been triggered by a court ordered evaluation.

The Court also found that Bell could not be considered ineffective for failing to request a competency hearing because the statute was explicitly permissive and he was therefore under no legal requirement to do so. The Court then noted, in language similar to that presented in the Commonwealth's brief to us:

> We also observe that Appellant has failed to demonstrate that counsel's actions caused him prejudice. Appellant failed to show that had counsel requested a competency examination under the Act, the trial court would have exercised its discretion and ordered the examination. Appellant also failed to show the examination would have established Appellant was incompetent to stand trial.

> Appellant in addition failed to show that this evidence, together with any other evidence offered by Appellant, would have been clear and convincing on the issue of competence [the standard a defendant was required to prove at the time of Hummel's trial to show incompetence]. Thus, Appellant fails to demonstrate that counsel was ineffective with respect to the issue of competency to stand trial.

Commonwealth v. Hummel, No. 1169 WDA 1999, maj. slip op. at 17-18 (Pa. Super. Ct. Sept. 28, 2001).

Judge Brosky, the dissenting judge, stated that, under the circumstances of this case, Bell was required to ask for a hearing, and that the use of "may" in the statute merely indicated groups of individuals who were authorized to petition the court for a hearing. Judge Brosky opined that Hummel met his burden to show that this action prejudiced him by a preponderance of the evidence (the standard in Pennsylvania to prove prejudice). He also suggested that Bell's inexperience may have been a factor, noting that although Bell had ten years experience as a public defender, this was his first experience with a client who had a competency issue.

The Pennsylvania Supreme Court thereafter denied Hummel's appeal. Having thus exhausted his options in the state court, Hummel filed a federal habeas petition in the United States District Court for the Western District of Pennsylvania.

F. The Federal Habeas Petition

The District Court referred the habeas petition to a Magistrate Judge who concluded that under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2254, he was required to respect the factual finding of the state court that Hummel had been competent at the time of trial. He recommended that the petition be denied; the District Court followed that recommendation. The District Court added that it would have reached the same conclusion even on de novo review.

A motions panel of this court issued the following certificate of appealablity: "whether the District Court erred in denying on the merits appellant's claim that his trial counsel rendered ineffective assistance to appellant's prejudice by 'agreeing' at the August 10, 1992[,] conference that appellant was competent to stand trial and by declining either to request a psychiatric evaluation of appellant and a competency hearing under the provisions of the Pennsylvania Mental Health Procedures Act codified at 50 P.S. § 7402 or to otherwise revisit the issue of appellant's competence before trial."

II.

Jurisdiction and Standard of Review

The District Court had jurisdiction under AEDPA.[3] We review the decision of the District Court de novo. *Fahy v. Horn*, 516 F.3d 169, 179 (3d Cir. 2008).

Because the state appellate court determined Hummel's previous claim of ineffective assistance of counsel on the merits, we must review that decision under the highly deferential standard in AEDPA, which

> prohibits a federal court from granting an application for a writ of habeas corpus with respect to a claim adjudicated on the merits in state court unless that adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."

Williams v. Taylor, 529 U.S. 362, 399 (2000) (O'Connor, J., concurring) (quoting 28 U.S.C. § 2254(d)(1)). Also, under AEDPA "a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

---

[3] It is conceded that Hummel exhausted his state remedies.

III.

Discussion

A.

Before we analyze the particulars of Bell's representation, it is necessary to emphasize the significance of the Sixth Amendment right to counsel. As the Supreme Court stated in the *Strickland v. Washington*, 466 U.S. 668, 685 (1984), "[t]he Sixth Amendment recognizes the right to assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results." As the Supreme Court thereafter stated in the companion cause decided by it on the same day as *Strickland*:

> An accused's right to be represented by counsel is a fundamental component of our criminal justice system. Lawyers in criminal cases "are necessities, not luxuries." Their presence is essential because they are the means through which the other rights of the person on trial are secured. Without counsel, the right to a trial itself would be "of little avail," as this Court has recognized repeatedly. "Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for its affects his ability to assert any other rights he may have."

United States v. Cronic, 466 U.S. 648, 653-54 (1984) (citations and footnotes omitted). Thus the inquiry

required under the Sixth Amendment is whether petitioner has demonstrated that (1) "counsel's performance was deficient" and (2) "the deficient performance prejudiced the defense." *Strickland*, 466 U.S. at 687.

An attorney's conduct is judged based on whether it is reasonably effective. *Strickland*, 466 U.S. at 687. This reasonableness, in turn, is measured based on the "prevailing professional norms." *Id.* at 688. The American Bar Association standards are guides, but only guides, to what is reasonable. *Id.* More recently, in *Rompilla v. Beard*, 545 U.S. 374 (2005), a habeas case, like this one, that challenged the Pennsylvania courts' rejection of the petitioner's ineffective assistance of counsel claim, the Supreme Court stated that "the American Bar Association Standards for Criminal Justice in circulation at the time of [defendant's] trial describes the obligation in terms no one could misunderstand in the circumstances of a case like this one." *Id.* at 387. The Court continued, "'[W]e long have referred [to these ABA Standards] as "guides to determining what is reasonable."' *Wiggins v. Smith*, 539 U.S. [510,] 524 [(2003)] (quoting *Strickland v. Washington*, 466 U.S., at 688), and the Commonwealth has come up with no reason to think the quoted standard impertinent here." 545 U.S. at 387 (footnote omitted).

Of course, the reasonableness of counsel's conduct must be judged based on the facts of the particular case at the time the questioned conduct

occurred. *Strickland,* 466 U.S. at 690. As the *Strickland* Court explained:

> [S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

Id. at 690-91.

The certificate of appealability granted in this case requires that we focus on two aspects of Bell's performance that Hummel challenges: Bell's agreement that Hummel was competent to stand trial on August 10, 1992, and Bell's failure to request that the court order an evaluation of Hummel's competency by a psychiatrist. The issues are interrelated. If it was unreasonable for Bell to have stipulated that Hummel was competent, it would necessarily have been unreasonable for Bell not to have pressed for a psychiatric examination and a competency hearing.

B.

At the time at issue, the ABA Standards for Criminal Justice stated, "[a]s soon as practicable the

lawyer should seek to determine all relevant facts *known to the accused*." ABA Standards for Criminal Justice, Standard 4-3.2(a) (emphasis added), *reprinted in* Stephen Gillers & Roy D. Simon, Jr., Regulation of Lawyers: Statutes and Standards, at 343 (1991). The relevant mental health standard read, "[d]efense counsel should move for evaluation of the defendant's competence to stand trial whenever the defense counsel has a good faith doubt as to the defendant's competence. ABA Criminal Justice Mental Health Standards, Standard 7-4.2(c) (1989). As the Supreme Court has noted, when reviewing a decision such as this, we are to look at whether the background investigation that led to Bell's decision to stipulate to Hummel's competency was reasonable. *Wiggins v. Smith*, 539 U.S. 510, 522-23 (2003).

At the time that Bell agreed with the Commonwealth that Hummel was competent to stand trial, Bell relied on the reports from the two psychologists. Dr. Tepper, the Commonwealth's psychologist, reported that Hummel had an I.Q. score of 65, which placed him in the mentally retarded range of intelligence, that he did not remember whether he had been arrested for shooting his wife, that he did not know who his lawyer was, that he did not know the function of the judge or the prosecutor or district attorney, and that he had seen a trial on television. Dr. Tepper further stated that Hummel had "an extremely limited understanding of the criminal legal process," "a rudimentary knowledge of the arrest and courtroom procedure," and "did not know or understand the roles of the

various courtroom personnel or how a trial was conducted." R. at. 14a. Continuing, "[t]he past records and present evaluation indicate that as a result of his head trauma, Mr. Hummel possesses limited cognitive skills." R. at 14a. The Commonwealth's psychologist continued:

> A major component in Mr. Hummel's present capacity to proceed to trial is whether he can communicate with his attorney, and whether he can discuss the facts and circumstances surrounding his arrest. Such discussion and communication abilities turn, in part, upon his ability to remember past events.
>
> The past information and present testing data shows that Mr. Hummel possesses deficits with short-term memory. That is, he is less able to recall events which occurred in the immediate past. His short-term memory is not entirely impaired, but he has exhibited difficulties in this area since the date of his shooting.

R. at 16a.. He then concluded:

> Based upon the available information and data, this examiner is unable to state, within a reasonable degree of psychological certainty, whether or not Mr Hummel currently is capable of proceeding to trial. He possesses a rudimentary knowledge of courtroom procedure, and does appear capable of assimilating new material if such material

is presented in a concrete, simplified fashion. Mr. Hummel does exhibit short-term memory deficits, and thus it would be necessary to insure, on an ongoing basis, that Mr. Hummel was following and retaining what legally was happening around him. As a result of his physical problems, Mr. Hummel is unable to sit for prolonged periods of time, and thus any courtroom proceedings would need to take into account these physical and fatigue limitations.

The main question in mind of this examiner, very simply, is how much or how little information Mr. Hummel recalls regarding the facts and circumstances surrounding the death of his wife, and how able or unable he is to communicate this information to his attorney. The available record information, as compared to the results of the present evaluation, suggests that in the past Mr. Hummel has exhibited a greater understanding of the facts and circumstances surrounding the death of his wife. He currently is able to recall certain past events, dates, occurrences, and information. However, he stated to this examiner that he had no real understanding or knowledge of the whereabouts of his wife or how he sustained his physical injuries. Thus, in light of these factors, it is difficult to state within a reasonable degree of psychological certainty whether or nor Mr. Hummel remembers the facts and circumstances surrounding the death of his wife.

R. at 17a.

The report of Dr. Berger, the defense's psychologist, was not markedly different, although less detailed. His report stated:

> In general, Mr. Hummel appears to be marginally competent to stand trial. The word marginally is used since there are two major areas of deficiency; both of these are in his ability to meaningfully assist his counsel in his defense. While Mr. Hummel is currently capable of thinking rationally in a planned and organized manner, this ability appears to wax and wane, as does his ability to attend to what is going on around him. His difficulties in these areas appear to be a result of the brain damage suffered as a result of the gunshot wound to his head.
>
> The second questionable area of Mr. Hummel's ability to participate in his defense is related to his total lack of recall of the events just prior to the shooting of his wife as well as the events continuing through his self-inflicted injury.
>
> . . . The difficulty regarding his ability to carry on rational thought processes and to attend to what is going on is a more serious matter. I believe that this issue could be addressed by some modifications in what is traditional courtroom procedure. In order for Mr. Hummel to following the legal proceedings and to meaningfully participate with his

> attorney in his defense, I believe his attorney will have to frequently get Mr. Hummel's attention and draw him back to what is happening in the courtroom. It also may be necessary for counsel to frequently review with Ed what has just been said and/or what has just transpired.
>
> Additionally, due to Mr. Hummel's limited attention span, it may be necessary to have frequent court breaks and to make sure that witness testimony is provided in short doses. In this way, Mr. Hummel's attorney can continuously check with Mr. Hummel regarding what has recently been said. If testimony or proceedings were to go on for more than five to ten minutes at a time without drawing Mr. Hummel back into the proceedings, I believe his ability to follow the proceedings would be severely limited.

R. at 20a.

We must ask whether either of these reports presented such an unqualified affirmation of Hummel's competency to stand trial so as to lead reasonable attorney under these circumstances to stipulate that Hummel was competent. The answer is self-evident. Neither does. The reports from the psychologists were hardly ringing endorsements of Hummel's competency. There is little reason to believe that testimony from a psychiatrist would not have been enough to tip the scales, and it was unreasonable for Hummel's counsel not to pursue this further.

In addition, we emphasize that Bell never met with Hummel in person before agreeing he was competent. Hummel's parents, his guardians, repeatedly advised Bell of their belief that Hummel was incompetent and pressed him to seek a psychiatric consultation, even providing him with a list of potential psychiatrists.

Both psychologists hedged on the dispositive question whether Hummel could assist Bell. Both reported that Hummel had no recollection of the shooting incident, and without such information it is difficult to see how Bell could have presented a viable defense of provocation. Moreover, Bell never asked Hummel about his recollection of the shooting and the events that precipitated it. Bell did not challenge the decision of Hummel's parents that he could not meet with Hummel because Hummel was incompetent. This was patently contrary to Criminal Justice Standard 4-3.2(a), which requires that a lawyer meet with a client to learn the client's version of events. Nonetheless, Bell participated in a meeting with the District Attorney and the trial judge, and agreed that Hummel was competent to stand trial.

The Commonwealth responds that Bell did not stipulate to his client's competency and actually states that because it was Bell's petition that brought the issue before the court and he requested continuances that permitted mental evaluation, "it is absurd to think that he then stipulated to his client's competency." Appellee's Br. at 16. The order of the

trial court belies the Commonwealth's position. The court's order on August 10, 1992 states:

> AND NOW, this 10th day of August, 1992, the Court having received and reviewed the reports of Dr. Allen M. Tepper and Vincent F. Berger, the Commonwealth's and Defendant's Experts who performed separate psychological [sic] evaluations, *and upon the agreement of the Commonwealth and the Office of the Public Defender representing the Defendant, it is the ORDER of this Court that the Defendant is found to be competent to stand trial.* Furthermore, the Court has been made aware of the physical and mental restrictions of the Defendant as set forth in the above described reports, and will take the same into account during trial or any other legal proceedings, during which the Defendant's presence is required.

R. at 2a (emphasis added). We must accept the trial court's statement, incorporated in its order, that Bell agreed that Hummel was competent to stand trial.

At the PCRA hearing, Bell testified that he believed Hummel was competent but added: "[w]hether he was competent to testify in his own defense, I don't know." App. At 33a. When asked to expand on this response, bell said that he believed Hummel understood what was going on in the courtroom, but that based on the reports from the psychologists he was not sure whether Hummel was able to remember what had occurred immediately before the shooting. Bell conceded that he did not

ask Hummel what he remembered from that night and did not believe he was under any duty to do so. He never asked Hummel what he meant by his outburst about the "blow jobs." Bell also testified that during the trial he was forced to continually prod Hummel to keep him focused.

His description of the events at the trial makes manifest that a reasonable attorney would have had a sound basis to question his client's competency and to press for further evaluations. Bell's own testimony belies his conclusion that Hummel understood what was going on. Bell testified:

> So during the course of trial, during the course of the preliminary hearing, during the course of jury selection, *I would describe verbally to Ed what was occurring in the courtroom*. In light of that, I felt that Ed was competent; that is, he was understanding what was going on, he was acknowledging and responding to the questions.
>
> As to whether he was competent to testify at his trial, in light of what Dr. Berger had said that he could not recall the incidents of the actual shooting itself and directly thereafter, in light of the Commonwealth report with regard to that, I didn't know whether Ed was competent; that is, whether Ed could describe what occurred at the residence or not.

App. at 34a (emphasis added). Again, Bell's interpretation of what he was required to do is clear from his own testimony:

> Q. Mr. Bell, don't you agree that as an effective trial attorney you had to interrogate your client about what occurred in that house immediately before the shooting?
>
> A. No, I don't think I had to.
>
> Q. You don't believe you had to?
>
> A. Nope; not in light of the information that I had.

App. At 34a-35a.

The combination of (1) Bell's stipulation to the competency of a defendant he had never met; (2) never meeting with Hummel between the preliminary hearing and jury selection, and failing to explain to Hummel's parents why such a meeting was necessary and press them to arrange it; (3) failing to advise the trial court of Hummel's parents/guardians' concerns about Hummel's competency; and (4) concluding Hummel was competent after reviewing what were, at best, ambivalent psychological reports on the defendant's competency, leads us to conclude that a reasonable attorney would not have stipulated to his client's competency without insisting on more information and further proceedings. Bell was ineffective for failing to do so.

The Commonwealth also argues that Hummel has not shown that the trial judge would have exercised his discretion and ordered further psychiatric testing or granted a competency hearing. Of course, we cannot hold with any reasonable certainty that the trial court would have held a competency hearing. But it was Bell's stipulation to Hummel's competency that removed from the trial judge the necessity of making any such decision. Given the ambivalence of the two psychologists, and the fact that Hummel had put a bullet through his brain, it is certainly probable that the trial court would have directed an intensive inquiry to Bell's mental stage and Bell advised the trial judge of Hummel's parents concerns and of Bell's failure to have any meaningful interactions with his own client.

C.

Bell's failure to attempt to invoke the Pennsylvania procedures designed for the situation when a defendant's competency is questionable is a further basis for finding Bell was ineffective. The Pennsylvania Mental Health Procedures Act provided that a request for "an incompetency examination may be presented by an attorney for the Commonwealth, a person charged with a crime, his counsel, or the warden or other official in charge of the institution or place in which he is detained." 50 Pa. Stat. Ann. § 7402(c). There can be no question, therefore, that Bell could have filed an application for examination of Hummel's competency. The court had discretion to order such an examination ("[t]he

court, either on application or on its own motion, may order an incompetency examination at any stage in the proceedings," *Id* § 7402(d)). The statute further provides that such an examination "shall be conducted by at least one psychiatrist and may relate both to competency to proceed and to criminal responsibility for the crime charged." *Id.* § 7402(e)(2).

On appeal from the denial of the PCRA, the Superior Court interpreted that provision to mean that it is within the discretion of the trial court to order an incompetency examination. We defer to the Superior Court's construction of the Pennsylvania statute but the issue is whether Bell should have appealed to the discretion of the trial court to order such an examination. It is precisely that point that was recognized in the dissenting opinion of Judge Brosky of the Superior Court, where he stated that under the circumstances Bell "should have at least requested the court to order that [Hummel] undergo a competenc[y] determination by a psychiatrist." *Hummel,* No. 1169 WDA 1999, dis. slip op. at 7-8 (Brosky, J., concurring and dissenting). He further stated, "I also believe that [Bell] should not have stipulated without actually requesting an examination and a hearing." *Id.* at 8. We need not decide whether the trial court was required to direct a psychiatric examination. The issue before us is not the trial court's decisions but whether Bell's actions or inactions show his ineffectiveness. The focus on the ineffectiveness claim is that Bell never even asked that a psychiatrist be appointed. We see no persuasive explanation for his failing to have done so.

Would it have made a difference? Beyond the requirement that the defendant demonstrate an error by counsel, the defendant must also demonstrate that counsel's error had an effect on the judgment. *Strickland*, 466 U.S. at 691. That is, the defendant must provide prejudice, the second prong of the *Strickland* inquiry. *Id.* at 693. However, the Court in *Strickland* defined this very carefully. It is not necessary that the defendant show that the deficient conduct "more likely than not altered the outcome in the case." *Id.* Instead, the defendant must only demonstrate that "there is a *reasonable probability* that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694 (emphasis added). In this case, Hummel must demonstrate that there is a reasonable probability he would have been found incompetent to stand trial.

To be found competent to stand trial, a defendant must "have sufficient ability at the pertinent time to consult with his lawyers with a reasonable degree of rational understanding of the proceedings against him." *Commonwealth v. Kennedy*, 305 A.2d 890, 892 (Pa. 1973) (citing *Dusky v. United States*, 362 U.S. 402 (1960)).

Dr. Wettstein, the psychiatrist appointed by Hummel's later counsel, examined Hummel and testified at the PCRA hearing about his conclusion that Hummel was incompetent at the time of his trial. He had reviewed the medical records and described the extent of Hummel's brain damage thus: "He had a penetrating gunshot wound to his

brain which went through on one side of his head and exited on the other side of his head." R. at 436a. The bullet entered the brain and "exited on the other side of the parietal lobe on the other side of the head with some damage below as well." R. at 438a. When asked what effect such a wound had in terms of a client communicating with his lawyer either in preparation for trial or in the actual trial, he stated that "we're dealing with short-term memory in the sense that the client needs to be able to remember what the attorney has said and use that memory in further discussions with his attorney. If he doesn't remember what's said ten minutes before, he's not going to be able to know what to say or how to deal with the attorney ten minutes later." R. at 439a. That also stands true for his ability to listen to witnesses and digest what witnesses were saying.

Dr. Wettstein further testified that Hummel "had severe . . .cognitive impairments, intellectual impairments of his attention and his memory and his concentration and the speed with which he would process information." R. at 443a. He also testified that the recommendations of the psychologists as to what should be done to keep Hummel aware of what was going on at the jury selection and the trial "were entirely unrealistic; that it was not a realistic recommendation to demand or require that an attorney or even the court frequently interrupt the proceedings to arouse the Defendant to keep him refreshed in terms of his memory and to keep him pumped up, so to speak, mentally throughout the duration of proceedings in a homicide trial such as this on." R. at 444a-45a.[4]

[4] Because Bell had stipulated to Hummel's competency without following up on Hummel's parents' arguing to retain a psychiatrist, the opinion of Dr. Wettstein or a comparable psychiatrist was never offered by Bell either before or at Hummel's trial. In a recent opinion filed by this court we held that counsel's failure to conduct a full investigation of the murder scene demonstrated ineffective assistance of counsel. *Sichl v. Grace*, -- F.3d -- , No. 07-1568 (3d Cir. March 25, 2009). As we stated, when a strategic choice is made by counsel without the full investigation warranted by the facts and circumstances, it is unreasonable. Certainly, Bell's choices were at least as unreasonable as those of Siehl's counsel.

The issue before us is not whether we must defer to the state court's determination that Hummel was competent but whether Bell was ineffective in his omissions and actions that led to the state court's determination that Hummel was competent and, if so, whether Hummel was prejudiced as a result. As our prior discussion demonstrates, Bell was so clearly ineffective that the state court's finding to the contrary is not entitled to deference because it was an unreasonable application of *Strickland*. *Williams*, 529 U.S. at 409-13. We also conclude, though for a different reason, that we are not bound to accept the state court's finding that Hummel was not prejudiced.

Under AEDPA a state court decision can be overturned when it is contrary to clearly established United States Supreme court precedent. [5] When expanding upon what it meant to be contrary to a clearly established precedent, the Court used the following example in *Williams*:

> A state-court decision will certainly be contrary to our clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases. Take, for example, our decision in *Strickland v. Washington*, 466 U.S. 668 (1984). If a state court were to reject a prisoner's claim of ineffective assistance of counsel on the grounds that the prisoner had not established

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[5] At the time of Hummel's trial, a defendant in a Pennsylvania state court was required to prove incompetence by clear and convincing evidence. *Commonwealth v. Banks*, 521 A.2d 1, 12 (Pa. 1987), *cert. denied* 484 U.S. 873 (1987), *denial of post-conviction relief aff'd* 656 A.2d 467 (Pa. 1995), *cert. denied* 516 U.S. 835 (1995). The Pennsylvania standard has since been changed to require a showing of incompetency by only a preponderance of the evidence, 50 P.S. § 7403(a), as required by the decision in *Cooper v. Oklahoma*, 517 U.S. 348, 369 (1996). Because of our disposition on other grounds, we need not consider the effect of *Cooper*. We note, however that in a similar situation the court of Appeals for the Tenth Circuit declined to defer to a state court competency determination made based on the clear and convincing standard of proof. *Walker v. Attorney General*, 167 F.3d 1339, 1345 (10th Cir. 1999).

> by a preponderance of the evidence that the result of his criminal proceedings would have been different, that decision would be "diametrically different," "opposite in character or nature," and "mutually opposed" to our clearly established precedent because we held in *Strickland* that the prisoner need only demonstrate a "reasonable probability that . . . the result of the proceeding would have been different." *Id.* || at 694.

Williams, 529 U.S. at 405-06. This is *exactly* what happened in this case. The Superior Court of Pennsylvania said:

> Appellant has failed to demonstrate that counsel's actions caused him prejudice. Appellant failed to show that had counsel requested a competency examination under the Act, the trial would have exercised its discretion and ordered the examination. Appellant also *failed to show the examination would have established* Appellant was incompetent to stand trial. Appellant in addition failed to show that this evidence, together with any other evidence offered by the Appellant, would have been clear and convincing on the issue of competence. Thus, Appellant fails to demonstrate that counsel was ineffective with respect to the issue of his competency to stand trial.

Hummel, No. 1169 WDA 1999, maj. slip op. at 17-18 (emphasis added).

In light of the Court's failure to use the Supreme Court's standard, i.e., "reasonable probability," and its use of the more stringent requirement of "show," the Superior Court 's holding that Bell's actions did not prejudice Hummel is not entitled to deference because it was contrary to clearly established United States Supreme Court law. We conclude, for the reasons set for above, (1) that Hummel's counsel was ineffective for failing to deal appropriately with the likelihood that Hummel was incompetent to stand trial and (2) that there was a "reasonable probability" that Hummel was prejudiced by this ineffectiveness. *Williams*, 529 U.S. at 406. It follows that the District Court erred in denying Hummel's request for a writ of habeas corpus.

Because Hummel's conviction was tainted by his counsel's ineffectiveness, we will reverse the District Court's order denying habeas relief and remand with direction that the District Court issue an order remanding this matter to the Pennsylvania state court to vacate Hummel's conviction and, if the Commonwealth so requests, to determine whether Hummel is competent to be retried. The District Court's order shall provide that the petitioner may be retried within six months if he is deemed to be competent, and that, if petitioner is determined to be incompetent, the state court may proceed in accordance with Pennsylvania state law.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 06-2711

EDWARD V. HUMMEL,
Appellant

v.

FREDERICK ROSEMEYER, Superintendent; Esquire *TOM CORBETT ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA

*{Substituted pursuant to F.R.A.P. 43 (c)}

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. No. 02-cv-00313J}
District Judge: Honorable Kim R. Gibson

Before: SLOVITER, STAPLETON and TASHIMA*,
Circuit Judges

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*Honorable A. Wallace Tashima, Senior Judge of the United States Court of Appeals for the Ninth Circuit, sitting by designation.

JUDGEMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued on October 30, 2008.

On consideration whereof, it is now hereby ADJUDGED and ORDERED that we will reverse the District Court's order entered April 20, 2006, denying habeas relief and remand with direction that the District Court issued an order remanding this matter to the Pennsylvania state court to vacate Hummel's conviction and, if the Commonwealth so requests, to determine whether Hummel is competent to be retried. The District Court's order shall provide that the petitioner may be retried within six months if he is deemed to be competent,

and that, if petitioner is determined to be incompetent, the state court may proceed in accordance with Pennsylvania state law.

Attest:

/s/ Marcia M. Waldron
Clerk

DATED: April 29, 2009

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

EDWARD V. HUMMEL,	)	
Petitioner,	)	
v.	)	Civil Action
	)	No. 3:2002-313
FREDERICK ROSEMEYER	)	
Superintendent,	)	
Esquire Tom CORBETT	)	Judge Gibson
ATTORNEY GENERAL OF	)	
THE COMMONWEALTH OF	)	
PENNSYLVANIA,	)	
	)	
Respondents	)	

ORDER

AND NOW, this 5th day of June, 2009, in accordance with the June 4, 2009 mandate issued by the Court of Appeals for the Third Circuit, IT IS HEREBY ORDERED THAT this matter is remanded to the Court of Common Pleas of Clearfield County and that said court shall vacate the judgment of conviction entered against the Petitioner.

IT IS FURTHER ORDERED THAT should the Commonwealth of Pennsylvania seek to retry the Petitioner, the Commonwealth of Pennsylvania

shall retry the Petitioner within six months after a determination that the Petitioner is competent to stand trial and if the Petitioner is found to be incompetent to stand trial, the Court of Common Pleas of Clearfield County shall proceed with the matter in accordance with the law of the Commonwealth of Pennsylvania.

BY THE COURT:

/s/ Kim R. Gibson
KIM R. GIBSON
UNITED STATES DISTRICT JUDGE

NO. 09-376

IN THE
SUPREME COURT OF THE UNITED STATES

FREDERICK ROSEMEYER ROSEMEYER,
SUPT.; AND TOM CORBETT, ESQ.
ATTORNEY GENERAL OF THE COMMONWEALTH
OF PENNSYLVANIA,

Petitioners,

vs.

EDWARD V. HUMMEL,

Respondent.

RESPONSE TO PETITION FOR WRIT OF
CERTIORARI

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI

The decision by the United States Court of Appeals For the Third Circuit is published, Hummel v. Rosemeyer, 564 F. 3d 290 (3rd Cir. April 29, 2009). The facts recited and the conclusions reached are manifestly correct, and review by This Honorable Court is not required. No new statement of the law is involved, Siehl v. Grace, 561 F. 3d 189 (3d Cir. 2009), Hummel ibid. page 304, fn. 4).

Petitioners do not properly apply Strickland v. Washington, 466 U. S. 668, 685, 104 S. Ct. 2052, 80 L. Ed 2d 674 (1984), pages 8-26 of the instant petition, all captioned as "Reasons for Granting the Writ"—

The Third Circuit succintly and properly applied Strickland, supra, published opinion, pages 304-305:

> The issue before us is not whether we must defer to the state court's determination that Hummel was competent but whether Bell was ineffective in his omissions and actions that led to the state court's determination that Hummel was competent and, if so, whether Hummel was prejudiced as a result. As our prior discussion demonstrates, Bell was so clearly ineffective that the state court's finding to the contrary is not entitled to deference because it was an unreasonable appliction of Strickland. Williams, 529 U. S. at 409-13, 120 S. Ct. 1495. We also conclude, though for a different reason, that we are not bound to accept the state court's finding that Hummel was not prejudiced...
>
> In light of the Court's failure to use the Supreme Court standard, i.e., "reasonable probability," and its use of the more stringent requirement of "show" the Superior Court's holding that Bell's actions did not prejudice Hummel is not entitled to deference it was contrary to clearly established United States Supreme Court law. We conclude, for the reasons set forth above, (1) that Hummel's counsel was ineffective for failing to deal appropriately with the likelihood that Hummel was incompetent to stand trial and (2) that there was a"reasonable probability" that Hummel was prejudiced by this ineffectiveness. Williams, 529 U. S. at 406, 120 S. Ct. 1495. It follows that the District Court erred in denying Hummel's request for a writ of habeas corpus.

REVIEW OF PETITIONERS' STATEMENT OF THE CASE

Neither psychologist who examined respondent was a "doctor," page 4 of the petition---that is not a medical doctor, a psychiatrist, as required by Pennsylvania's Mental Health Procedures Act, see published opinion by the Third Circuit, at pages 295-296. On direct appeal to the Superior Court, without laying any foundation at trial to support incompetency, the Superior Court rejected trial counsel's position (page 7 of the petition). The Third Circuit relied heavily on the testimony of Dr. Robert Wettstein, a Board Certified Forensic Psychiatrist, presented on respondent's behalf, at the PCR hearing before the trial judge in approximately three years after the homicide conviction, opinion by the Third Circuit, pages 303-304, published.

Petitioners never once observed the requirement of the Mental Health Procedures Act that respondent had to be examined by at least one psychiatrist before trial. This omission must be construed as deliberate, in the total context of the facts and circumstances of this badly botched performance by Bell, who at the time of trial, was the Public Defender.

PETITIONERS' ARGUMENT THAT DEFENSE COUNSEL ACTED REASONABLY IS OUTRAGEOUS

At page 13 of their petition, petitioners argue the Third Circuit has engaged in "Monday morning quarterbacking", and has substituted the court's judgment for that of the state court. Again, petitioners fail to understand the Third Circuit's statement of the issues, above, and the correct application of Strickland. Petitioners continue to characterize both psychologists as "doctors" who opined that respondent was legally competent to stand trial (page 14 of the petition).

The Circuit court viewed both reports by the psychologists as follows (564 F. 3d page 302):

> Of course, we cannot hold with any reasonable certainty that the trial court would have held a competency hearing. But it was Bell's stipulation to Hummel's competency that removed from the trial judge the necessity of making any such decision. Given the ambivalence of the two psychologists, and the fact that Hummel had put a bullet through his brain, it is certainly probable that the trial court would have directed an intensive inquiry into Bell's mental stage had Bell advised the trial judge of Hummel's parents concerns and of Bell's failure to have any meaningful interaction with his own client. Earlier at page 300, the court opined that "Both psychologists hedged on the dispositive question whether Hummel could assist Bell. Both reported that Hummel had no recollection of the shooting incident..." (Emphasis added).

At the conclusion of page 21 of the petition, petitioners continue to urge trial counsel's reasonable efforts on behalf of his client because of"the pre-trial expert medical reports..." again referring to the reports of the two psychologists.

Judge Brosky, dissenting in the Superior Court, aptly described trial counsel's ineffective approach on behalf of his client (at page 67 of petitioners' appendix, No. 1169 WDA 1999 and at page 76:

> Attorney Bell had a duty to inform himself fully of the facts and the law relative to Appellant's competence. However by his own testimony, he has demonstrated his lack of understanding as to the law regarding competence determinations.
>
> It appears that Attorney Bell believed that the appellant's competence or incompetence

> should be an issue of jury determination. Attorney Bell's argument that he did not want Appellant to testify for fear of ruining the position that Appellant was not competent is inexplicable. Incompetence is not a defense to first-degree murder or voluntary manslaughter. It is a fundamental question not to be determined prior to trial. (First emphasis is by respondent).

Attorney Bell did nothing material to further the issue of respondent's incompetence, and recklessly allowed the case of an incompetent defendant to proceed to a verdict of guilty of murder in the first degree with a life sentence. How could any reasonable judge or lawyer view Bell's performance as reasonable? His total performance was outrageously detrimental to his client's best interests.

PETITIONERS' ARGUMENT THAT HUMMEL CANNOT SHOW PREJUDICE IS FLAWED

"Bell's failure to attempt to invoke the Pennsylvania procedures designed for the situation when a defendant's competency is questionable is a further basis for finding Bell was ineffective," (564 F. 3d, page 302). The Circuit court then proceeds to discuss the Mental Health Procedures Act, and Judge Brosky's dissenting opinion on the same issue. The Circuit Court concludes with the subject at page 303:

> We need not decide whether the trial court was required to direct a psychiatric examination. The issue before us is not the trial court's decisions but whether Bell's actions---or inactions----show his ineffectiveness. The focus on the ineffectiveness claim is that Bell never even asked that a psychiatrist be appointed. We see no persuasive explanation for his failing to have done so.

The Third Circuit reviewed the reports of both psychologists in detail(564 F. 3d 298-300) and concluded that neither one would lead a reasonable attorney to stipulate to competency (at page 300). The court also concluded Bell's own testimony belied his conclusion that respondent knew what was going on (301-302) all of which supported Dr. Wettstein's testimony and the conclusion that respondent could not communicate with his attorney and establish provocation by his wife, significant prejudice, as well as defense counsel's inability to communicate with his client. During the District Attorney's closing argument, respondent blurted out "whose going to tell about the blow jobs?" (page 301).

The night before the end of the trial, respondent revealed to his mother, his wife came home and told him she performed oral sex on other men and came home and kissed him, right before the shooting. Mrs. Hummel told Bell this the next morning and Bell falsely told her the judge would not permit any more testimony about the victim's affairs.

CONCLUSION

The Petition for Writ of Certiorari does not entitle review by This Honorable Court. The Circuit Court's opinion and judgment are perfect. Wherefore Respondent moves that the Writ be denied.

Respectfully submitted,

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